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No. _____

In the
Supreme Court of the United States

TRIBAL GOVERNING BOARD OF THE LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS,

Petitioner,

vs.

SANDRA THOMAS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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124pp

QUESTION PRESENTED

Whether an American Indian Tribe, having interest in the continuity of its Tribal Constitution, is a necessary party, pursuant to Fed. R. Civ. P. 19, in an action by private parties contesting the validity of the Tribe's Constitution?

PARTIES TO THE APPEAL

The parties to the proceedings below were: Petitioner TRIBAL GOVERNING BOARD OF THE LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, the elected governing body of the Tribe. Defendants Eugene Begay, Donald E. Carley, Constance Corbine, Margaret Diamond, gaiashkibos, Michael Isham, Jr., and Alfred Trepania, the current members of the Tribal Governing Board, were named as individuals and in their official capacities.

Defendants Department of the Interior and Bureau of Indian Afairs are executive agencies of the United States. Defendant Bruce Babbit, Secretary of the Interior, was named in his official capacity. Defendant Ada E. Deer, former Assistant Secretary of the Interior for Indian Affairs, was named in her official capacity. Defendant Eddie F. Brown was the Assistant Secretary of the Interior for Indian Affairs in 1992, and was named in his official capacity. Defendant David Matheson was the Deputy Commissioner of the Bureau of Indian Affairs in 1992 and was named in his official capacity.

Respondents were parties below as follows: Plaintiff SANDRA THOMAS, a Lac Courte Oreilles member who lives within the Tribe's Reservation. Plaintiff TINA THOMAS is the daughter of Plaintiff Sandra Thomas. She lives within the Reservation and is listed on the ancillary roll. Plaintiffs ROBERT E. SANDER and MICHAEL NALEWAJA are members who live outside the Reservation.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported as Thomas v. U.S., at 189 F.3d 662, and is reprinted in the Appendix to the Petition of the Tribal Governing Board of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians beginning at page A-1. The Judgment of the U.S. District Court for the Western District of Wisconsin, Case No. 96-C-0828-C, filed on April 10, 1998, was not reported. It is reprinted in the Appendix to the Tribal Governing Board's Petition at page A-14. The memorandum decision of the U.S. District Court for the Western District of Wisconsin, Case No. 96-C-0828-C, entered March 27, 1998, was not reported. It is reprinted in the Appendix to the Tribal Governing Board's Petition beginning at page A-17. The memorandum decision of the U.S. District Court for the Western District of Wisconsin, Case No. 96-C-0828-C, entered October 14, 1997, was not reported. It is reprinted in the Appendix to the Tribal Governing Board's Petition beginning at page A-38. The Order on Rehearing of the U.S. District Court for the Western District of Wisconsin, Case No. 96-0828-C, entered December 13, 1999, was not reported. It is reprinted in the Appendix to the Tribal Governing Board's Petition beginning at page A-58.

STATEMENT OF JURISDICTIONAL GROUNDS

The decision of the United States Court of Appeals for the Seventh Circuit, of which the Petitioner now seeks review, was decided September 7, 1999. The Order on Rehearing of the United States Court of Appeals for the Seventh Circuit, was decided December 13, 1999.

The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and writ of certiorari is requested under Supreme Court Rule 10, subdivisions (a) and (c).

LEGAL AUTHORITY INVOLVED IN THE CASE

This case involves Fed. R. Civ. P. 19. This case also involves Article II, Section 2, and Article IV, Section 4, of the currently enacted Amended Constitution and Bylaws of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin, which provisions are reprinted respectively in the Appendix to the Tribal Governing Board's Petition at pages A-74 through A-75, and A-78.

STATEMENT OF THE CASE

This case involves the right of a federally recognized American Indian Tribe to govern its internal affairs in reliance on the continuity of its Tribal Constitution, the term of which had previously been determined to be effective by the Department of the Interior. The Seventh Circuit Court of Appeals has held that the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin ("the Tribe") is not a necessary party in a lawsuit which turns on the interpretation and application of the Tribe's own Constitution, reversing the District Court.

The Lac Courte Oreilles Band of Lake Superior Chippewa Indians is a federally recognized American Indian Tribe organized pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. 461 et. seq. The Tribe is governed by a Constitution and Bylaws duly enacted by membership and approved by the Assistant Secretary of the U.S. Department of the Interior on November 2, 1966. The Tribe's Constitution and Bylaws have been amended on various occasions. The Lac Courte Oreilles Tribal Governing Board

is the Tribe's duly elected governing body as set forth within its Constitution.

On February 2, 1992, a Secretarial Election was conducted by the Bureau of Indian Affairs, United States Department of the Interior (the "Department"), relative to two proposed amendments to the Tribe's Constitution. Proposed Amendment A would change the definition of membership and, further, direct the Tribal Governing Board to enact an ordinance to implement a new membership scheme. Appendix at A-82.[1] Proposed Amendment B would extend the length of the terms of the Tribal Governing Board members to four years with proscribed elections to be held in 1992 and 1993 and regularly scheduled thereafter. Appendix at A-84; Thomas v. U.S., No. 96-C-0828-C (W.D. Wis., October 14, 1997), Appendix at A-42 through A-43.[2]

A dispute arose as to whether the elections were properly conducted by the Bureau of Indian Affairs ("BIA"). A Petition signed by 261 Tribal members demanded that the Tribal Governing Board not recognize the Secretarial Election that was held on February 2, 1992.[3] The Tribal Governing Board expressed concern that the election was flawed and contested its validity on a number of grounds, before the BIA. Ultimately, on October 7, 1992, David Matheson, the then-Acting Assistant Secretary for Indian Affairs, set aside

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[1] More specifically, Proposed Amendment A provides that the Tribal Governing Board should enact an Ordinance subject to the approval of the U.S. Secretary of Interior, that would eliminate the 1/4 Lac Courte Oreilles blood membership requirement and enable any lineal descendant of a Lac Courte Oreilles member with any degree of LCO blood to gain membership. Thomas v. U.S., No. 96-C-0828-C (W. D. Wis., October 14, 1997), Appendix at A-42 through 43.

[2] Since Proposed Amendment B is time specific, providing for procedures that are to take place and commence respectively in 1992 and 1993, it is partially, if not completely, moot.

[3] The Petition was reviewed by the Lac Courte Oreilles Enrollment Department for legal signatures.

the Secretarial Election, determining that it was "fatally flawed" in that voting was not limited to the proper class. Appendix at A-59.

Four years after the Matheson determination, and four years and eight months following the election, the Plaintiffs initiated this action in October of 1996. The Plaintiffs, Sandra Thomas and others who had supported the amendments to the Tribal Constitution, initially brought this action against the United States and various federal officials in United States District Court for the Western District of Wisconsin, complaining of their action of setting aside the election.

When Plaintiffs first inititated their lawsuit against the U.S. Government Defendants, they invoked the original jurisdiction of the U.S. District Court pursuant to various federal statutes, including 25 U.S.C. § 476(d)(2), 28 U.S.C. § 1331, 28 U.S.C. § 1346(a)(2), 5 U.S.C. § 702, 28 U.S.C. § 1367, 28 U.S.C. § 2201, and 42 U.S.C. § 1985(3). The Plaintiffs also cited federal statutes 25 U.S.C. § 476(a) and (d), 5 U.S.C. § 706(2), and the Fifth, Ninth, Fifteenth and Twenty-Sixth Amendments to the United States Constitution as being involved.

Plaintiffs sought to void the Department's disapproval and sought individual damages. The United States filed a series of motions, including a motion to dismiss for failure to join an indispensable party, the Tribal Governing Board. The District Court deferred the motion of the United States, noting that the Tribal Governing Board may elect to join the suit or one of the existing parties may seek to join the Tribal Governing Board. Thomas v. U.S., (W.D. Wis., October 14, 1997), Appendix at A-38.

The Tribal Governing Board enacted a Resolution expressing its intention of asserting its sovereign immunity should an action be initiated against it by Plaintiffs. One month later, the Plaintiffs amended their Complaint to include the Tribal Governing Board members, individually

and in their official capacities, and the Tribal Governing Board, as Defendants, and to seek individual damages against the Tribal Governing Board officials. The District Court then dismissed the case, finding the Tribal Governing Board to be a necessary and indispensable party but also immune from suit. See Thomas v. U.S., No. 96-C-0828-C (W.D. Wis., March 27, 1998), Appendix at A-17. The Plaintiffs appealed to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals determined that the Tribal Governing Board is not a necessary party to the action, reinstated the case[4] and remanded it to the District Court. See Thomas v. U.S., 189 F.3d 662 (7th Cir. 1999), Appendix at A-1. The Tribal Governing Board then filed a Petition for Rehearing, which was denied by the Court of Appeals on December 13, 1999. See Thomas v. U.S., No. 98-2329, United States Court of Appeals for the Seventh Circuit, Order on Rehearing, Decided December 13, 1999; Appendix at A-58.

On March 9, 2000, the Tribal Governing Board passed a Resolution to authorize this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The proceeding involves one or more questions of exceptional importance because it involves the following issues: (1) In concluding that the Tribal Governing Board of an Indian Tribe is not a necessary party to litigation where the Tribe's constitutional membership criteria are at the heart of the controversy, the decision of the United States Court of Appeals for the Seventh Circuit conflicts with relevant decisions of this Court and raises important questions of federal law that have not been, but should be, decided by this Court; (2) The decision of the Seventh Circuit conflicts with the decision of this Court in Seminole Tribe of Florida v.

[4] Action against the individual Tribal Governing Board members was considered abandoned by the Seventh Circuit.

Florida, 517 U.S. 44 (1996), and the Eleventh Circuit in State of Florida v. Seminole Tribe of Florida, 181 F.3d 1237 (11th Cir. 1999); and (3) The decision of the Seventh Circuit interjects an additional criterion into the necessary party analysis that is not specified under Fed. R. Civ. P. 19, thus conflicting with the decisions of other United States Courts of Appeal on the same important matter and the Federal Rules. Consideration by this Court is therefore necessary to secure and maintain the uniformity of decisions among the federal courts.

I. IN CONCLUDING THAT THE TRIBAL GOVERNING BOARD OF AN AMERICAN INDIAN TRIBE IS NOT A NECESSARY PARTY TO LITIGATION WHERE THE TRIBE'S CONSTITUTIONAL MEMBERSHIP CRITERIA ARE AT THE HEART OF THE CONTROVERSY, THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT, AND RAISES IMPORTANT ISSUES OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

The Seventh Circuit concluded that the Lac Courte Oreilles Tribal Governing Board was not a necessary party[5] to the proceeding below because it focused its analysis upon the actions of the U.S. Department of the Interior, and did not adequately consider the well-settled sovereign right of an Indian Tribe to conduct its internal affairs according to its constitution. The Seventh Circuit's analysis is severely flawed because it disregards core tenets of Federal Indian law

[5] Necessary Party analysis is presented at Fed. R. Civ. P. 19. See footnote 21.

and, in so doing, threatens to undermine the centrality of Tribal government.

1. The Tribe Has a Paramount Right to Determine its Own Membership

An Indian tribe is free to establish or maintain its own form of government. Felix Cohen, Handbook of Federal Indian Law, Ch. 4, § C1, p. 247 (1982 ed). This power to form a government is the first element of sovereignty. Id. Thus, one of the most fundamental concepts of Indian law is that Indian tribes are dependent sovereign nations that retain full powers of internal self-government, except to the extent those powers have been limited by treaty or express federal congressional action.[6] American Indian self-government includes, among other principles, the *original* power of an Indian tribe to define conditions of tribal membership. Felix Cohen, Handbook of Federal Indian Law, Chap. 5, § 6, p. 98; Chap. 7, § 1, at 122 (1942).[7]

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[6] United States v. Wheeler, 435 U.S. 313 (1978); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Babbitt Ford. Inc. v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983), cert. denied, 466 U.S. 926 (1984); Maryland Casualty Co. v. Citizens National Bank of West Hollywood, 361 F.2d 517 (5th Cir. 1966), cert. denied, 385 U.S. 918 (1966); Thompson v. Area Director, 17 IBIA 40 [16 Indian Law Rep. 7017] (1989); see also Felix Cohen, Handbook of Federal Indian Law, Ch. 7, § 1, p. 122 (1942).

[7] In reaching its determination that the depth of the Tribe's interest in the matters addressed in the Secretarial election did not merit necessary party status under Rule 19(a), the Seventh Circuit failed to recognize that a tribe has a right to determine tribal membership for tribal purposes, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), and the federal government has the right to determine tribal membership for federal purposes. Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902); Simmons v. Eagle Seelatsee, 244 F.Supp. 808 (E.D. Wash. 1965), aff'd mem., 384 U.S. 209 (1966); Yellow Bird v. Oglala Sioux Tribe, 380 F.Supp. 438 (D. SD. 1974) (Indian tribes determine the blood quantum required to run for tribal office and the membership requirements, and federal courts may

This Court has affirmed these core tenets of Federal Indian law, stating that, "A tribe's right to define membership for tribal purposes has long been recognized as central to its existence as an independent political community." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n. 36 (1978); see also Chapoose v. Clark, 607 F.Supp. 1027 (D. Utah 1985), aff'd, 831 F.2d 931 (10th Cir. 1987). Indeed, tribes could not control their future if they lost this critical power.[8] Further, as recently as February 23, 2000, this Court reaffirmed that "various tribes [have] retained some elements of quasi-sovereign authority," and "[t]he retained authority relates to self-governance." Rice v. Cayetano, ____ U.S. ____, Bench Opinion at 21 (2000), citing Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 408, 425 (1989) (plurality opinion); Oliphant v. Suquamish Tribe, 435 U.S. 191, 208 (1978). Even more significantly, this Court has recently recognized that tribal elections are internal affairs over which tribes retain their quasi-sovereign authority. See Id. at 24; see also Rice v. Cayetano, ___ U.S. ___, Concurring Opinion at 4, February 23, 2000. (Breyer, J. and Souter, J., concurring) ("Of course, a Native American Tribe has broad authority to define its membership").

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determine only if the tribal requirements are being enforced). Following these two lines of cases, it is incumbent upon a court engaged in analyzing a Tribe's interest in determining its own membership to consider the purpose for which membership is at issue. In the instant case, the Tribe's blood quantum requirement for membership could be drastically altered, even though the Seventh Circuit does not attempt to determine what this membership requirement is. Thus, a determination regarding the requirements of Tribal membership is here being made, in the first instance, for tribal purposes.

[8] Thus, "courts have consistently held that in the absence of express legislation by Congress to the contrary, a tribe has complete authority, as a political entity, to determine all questions of its own membership." Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079, 1081 n. 3 (8th Cir. 1975), citing Martinez v. Southern Ute Tribe, 249 F.2d 915, 920 (10th Cir. 1957), cert. denied, 356 U.S. 960 (1958).

This Court has additionally recognized that many of the inherent powers of self-government retained by Indian tribes can be exercised without federal approval.[9] However, even in those areas where agencies are authorized to supervise and approve tribal activities, those agencies must act pursuant to the federal trust responsibility and exercise their powers in the tribe's best interests.[10] More to the point, as this Court recently recognized, in Cayetano, tribal elections held pursuant to the Indian Reorganization Act, 25 U.S.C. § 476 remain "the internal affair of a quasi-sovereign." See Rice v. Cayetano, ____ U.S. ____, Bench Opinion at 24 (2000). In other words, an agency must defer to a tribe's interpretation of its laws when interpreting tribal constitutions or statutes:

> Before beginning any analysis of tribal law, the Board [of Indian Appeals] notes that although the Department [of Interior] has the authority and responsibility to interpret tribal law as necessary to effectively carry out the government-to-government relationship existing between the tribe and the federal government, such interpretation is always undertaken with deference to the tribe's right to initially interpret its own laws and resolve its internal

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[9] Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 197, 198 (1985), citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982) (the "power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management").

[10] Morton v. Ruiz, 415 U.S. 199 (1974); U.S. v. Winnebago Tribe of Nebraska, 542 F.2d 1002 (8th Cir. 1976) ("[t]he overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions"); Northern Arapaho Tribe v. Hodel, 808 F.2d 741,750 (10th Cir. 1987)(citing United States v. Mitchell, 464 U.S. 206 (1983) (the Supreme Court has recognized the existence of a general trust relationship which has long dominated the relationship between the United States and the Indian people)).

> disputes. Thus, the Department gives due consideration to a tribe's reasonable interpretation of its own laws.

Thompson v. Area Director, 17 IBIA 40 [16 Ind. Law. Rep. 7023].[11] Stated differently, when the Department of the Interior, in its role as trustee, acts to ensure that a tribe's activities comply with federal law, the Department should abstain from further interference with the tribe's governmental affairs.[12] In other words, the Department's supervisory or approval activities do not, of their own accord, curtail a tribe's inherent powers of self-government. To the contrary:

> [t]he obligation of the BIA [Bureau of Indian Affairs] to review a tribal constitution is justified under its trust responsibility to administer the government-to-government relations between the United States and the Indian tribes .... In administering this trust responsibility the BIA must

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[11] See also Menominee Tribal Enterprises v. Minneapolis Area Director, 15 IBIA 263 [14 Indian L. Rep. 7053, 7054] (1987) ("[a]s always, the Board undertakes this examination of a tribal constitution and other governing documents with deference to the tribe's interpretation of its own laws") (citing Kiowa Comanche and Apache Intertribal Land Use Committee v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 207 [13 Indian L. Rep. 7061] (1986).

[12] Rogers v. Acting Deputy Ass't Secretary, 15 IBIA 13 [13 Indian L. Rep. 7082, 7083] (1986) ("[i]n furthering the doctrines of Indian sovereignty and self-determination, the Department has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes. Even when BIA has been required to interpret tribal laws in order to ensure that tribal action in which the Department has an interest is consistent with that law, it has given deference to the tribe's reasonable interpretation of its own laws); Benally v. Navajo Area Director, 9 IBIA 284 [9 Indian L. Rep. 6043] (1982).

> ensure that Indian rights to self-government are preserved, protected and guaranteed .... [I]t is the responsibility of the BIA to ensure that such actions [taken by the tribe] are taken in compliance with the tribal constitution and that the agency refrain from recognizing any such action taken in violation of the constitution. Nevertheless, measures taken by the BIA to ensure Indian compliance with their constitution must be narrowly tailored so as to be least disruptive of tribal sovereignty and self-determination, yet fulfill the trust responsibility of protecting the integrity of the Indian political process.

Thompson v. Area Director, 17 IBIA 40 [16 Ind. Law Rep. 7023] (emphasis added).

Further, by way of analogy, in Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985), this Court had occasion to analyze the effect of the Secretary of the Interior's approval authority over a tribe's constitution and bylaws. Unlike Lac Courte Oreilles, the Navajo are not organized pursuant to the Indian Reorganization Act of 1934 (IRA) at 25 U.S.C. § 476. In Kerr-McGee Corp., however, this Court made it clear that a tribe's inherent power to tax would remain intact, even if the tribe were governed by the IRA, unless otherwise modified by the tribe's own constitution or clear indications of Congressional intent to do so. In further corroboration of such a reading of the case, this Court also recognized, in Kerr-McGee, that:

> ...the most that can be said about this period of constitution writing is that the Bureau of Indian Affairs, in assisting the drafting of tribal constitutions, had a policy of including provisions for Secretarial approval; but that policy was not mandated by Congress.

Id. at 198 (internal citations omitted; emphasis added). In other words, the *Department's* implementation of approval provisions in IRA constitutions does not constitute an express federal congressional action that limits a tribe's inherent powers of self-government.[13]

It is well settled that Congress may abrogate a sovereign's immunity only by using statutory language that makes its intention unmistakably clear. Santa Clara Pueblo, 436 U.S. at 58 (recognizing that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed"). Indeed, where attributes of tribal self-government that the Federal Government is committed to promote are concerned, a federal court is obligated to tread lightly in the absence of clear indications of legislative intent. Kerr-McGee Corp., 436 U.S. at 200 (citing Santa Clara Pueblo, 436 U.S. at 60).

The decision of the Seventh Circuit recognizes that (1) a tribal constitution necessarily embodies the core values of government and self-determination; (2) accordingly, matters of fundamental importance to the Tribe include its own constitutional ratification and amendment process; and (3) tribes have a strong interest in matters, such as the proposed amendments that relate to membership criteria and election of Tribal officials. Despite the Seventh Circuit's express recognition of the Tribe's paramount interest in matters relating to its membership, it concluded that the Tribe was not a necessary party because it found that "[a]t its base, this

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[13] "Nor does the IRA itself limit tribal prerogatives; many IRA tribes have provisions requiring secretarial approval of tribal ordinances, but the 1985 Kerr-McGee Corp. v. Navajo Tribe of Indians opinion made it clear that those provisions came about as a result of administrative policy during the 1930s" and that nothing in the IRA requires such restrictions. Charles F. Wilkinson, American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy, p. 68 (Yale University Press 1987).

lawsuit is a challenge to the way certain federal officials administered an election for which they were both substantively and procedurally responsible." Thomas v. U.S., 189 F.3d 662, 667 (7th Cir. 1999); Appendix at A-8.

However, the focus of the Seventh Circuit is severely misguided. At the core of this lawsuit is the Tribe's vital interest in preserving the stability of its constitutional government. Plaintiffs did not commence suit until four years after the determination by the then-acting Assistant Secretary for Indian Affairs that the Secretarial Election, at which the amendments in controversy were proposed, was fatally flawed.[14] For the entire duration of that four year period the Tribe had governed its internal affairs, reasonably relying on the continuity and efficacy of its constitution. Further, although Plaintiffs do not dispute that the Department of the Interior acted, they assert it acted wrongly. Regardless of the Seventh Circuit's characterization of Plaintiffs' action as an election challenge, it strikes at the very heart of the Tribe's sovereign right to preserve the stability of its own government, by directly challenging the Tribe's right to rely on its established Constitutional criteria as to who its members are and how they are governed. Clearly, a ruling on the merits in favor of Plaintiffs on their claims will have the practical effect of modifying the constitutional provision containing the membership requirement. See Davis v. U.S., 192 F.3d 951, 959 (10th Cir. 1999). Unless the Tribe is a party to the lawsuit, it loses its ability to protect its claimed interest in determining membership requirements. Id. The Tribe has an undeniable interest in its sovereign right to preserve the stability of its own government.

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[14] For the sake of clarity, the Petitioners are not saying that Plaintiffs cannot bring their suit; rather, they are saying that the Tribal Governing Board is a necessary party at that point in time.

2. The Court of Appeals Did Not Appropriately Recognize the Interest of the Tribal Governing Board.

The Seventh Circuit found that the Department could adequately represent the interests of the Tribe. See Thomas v. U.S., 189 F.3d at 668, Appendix at A-9.[15] It based its finding

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[15] The Seventh Circuit also stated that its determination of the legal significance of the tribal interest under Rule 19(a) was based upon the "balance of power that Congress struck in this context." Thomas v. U.S., 189 F.3d at 8, Appendix at A-9. However, this analysis is unfounded, since Congress has provided no express statutory language whatsoever indicating a decision "to privilege federal control over tribal constitutional elections." See Thomas v. U.S., 189 F.3d at 9, Appendix at A-9.

The Seventh Circuit bases its finding that Congress has asserted such authority on the fact that, in 1988, Congress rejected the recommendation of the Department to remove the Secretarial approval provisions related to a tribe's governing documents and, thus, entrust the constitutional amendment process to the tribe. In order to deduce from the Congressional rejection of the Secretary's suggestion that Congress has somehow privileged federal control over tribal interests in constitutional elections, Congress would have to make it unmistakably clear that it intended to modify the original intent of the IRA to enhance Tribal self-government. However, such a conclusion can only be implied from Congressional inaction under the facts recognized by the Seventh Circuit, since Congress has not otherwise indicated any intention to delegate to the Department authority to manage Tribal consideration over amendments to its Constitution. Indeed, "[f]ederal courts must 'be more than usually hesitant to infer from [Congress's] silence a course of' action that while serving one legislative purpose, will dis-serve the other." Wheeler v. Swimmer, 835 F.2d 259 (10th Cir. 1987) (citing Santa Clara Pueblo 436 U.S. at 62 n. 12). Additionally, it is well established that a "doubtful expression of congressional intent must be resolved in favor of the Tribe." Bryan et al. v. Itasca County, Minnesota, 426 U.S. 373 (1976); McClanahan v. Arizona Tax Commission, 411 U.S. 164, 174 (1973); United States v. Winnebago Tribe of Nebraska, 542 F.2d 1002, 1006 (8th Cir. 1976). Further, as previously noted, this Court, in Kerr-McGee Corp., recognized that it was the Department of Interior, not Congress, that originally implemented the Secretarial approval provisions in IRA constitutions. Thus, the Secretary's suggestion involves a modification of the Department's actions, not those of Congress.

on State of Washington v. Daley, 173 F.3d 1158, 1167-69 (9th Cir. 1999), wherein the Ninth Circuit held that, with respect to the requirements of Fed. R. Civ. P. 19, "[t]he United States can adequately represent an Indian tribe unless there exists a conflict of interest between the United States and the tribe." Id. at 1167 (quoting Southwest Center for Biological Diversity v. Babbitt, 150 F.3d 1152, 1154 (9th Cir. 1998)).[16] However, Daley is inapplicable to the instant case

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With regard to *Congressional intent*, "[this] Court has repeatedly recognized that a primary function of the IRA is to promote tribal self-government." Timothy W. Joranko & Mark C. Van Norman, Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendment, 29 Gonz. L. Rev. 81, 84 n. 16 (1993/94) (citing County of Yakima v. Yakima Indians Nations, 502 U.S. 251 (1992); Fisher v. District Court, 424 U.S. 382, 387 (1976); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151-152 (1973)). In addition, Congress's commitment to tribal self-determination is also reflected in other congressional enactments. See Joranko and Norman, supra, n. 10, citing 25 U.S.C. 450a(b) (1988) ("The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, the Indian people through the establishment of a meaningful Indian self-determination policy ....").

The Congressional intent driving the IRA remains fully intact and vital. In the absence of explicit Congressional authority to the contrary, it cannot be assumed that Congress's rejection of the Department's recommendation is a modification of the Congressional intent in enacting the IRA. Despite the lack of such authority, the Seventh Circuit implies that Congress's failure to implement a recommendation of the Department guts the intent of the IRA. Put differently, the Seventh Circuit's analysis would imply illogically that the failure to undertake later legislation means that the existing legislation can no longer be relied upon and that its purpose has somehow been nullified.

[16] Indeed, it is a "rule that when 'there is a conflict between the interests of the United State and the interests of Indians, representation of the Indians by the United States is not adequate'". Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765, 775 (D.C. Cir. 1986), citing Manygoats v. Kleppe, 558 F.2d 556, 558 (10th Cir. 1977); New Mexico v. Aamodt, 537 F.2d 1102, 1106 (10th Cir. 1976), cert. denied, 429 U.S. 1121, 97 S.Ct. 1157 (1977); Hansen v. Peoples Bank of Bloomington, 594 F.2d 1149 (7th Cir. 1979).

because there are several conflicts of interest between the Government Defendants and the Tribe. First, Plaintiffs made allegations and sought monetary damages against both as separate wrongdoers. Further, Plaintiffs' allegations, and the findings of the Seventh Circuit, assert that the Department, while issuing a decision it was competent to issue, issued it too late, and, therefore, it would not be timely. If, however, that is the case, the Tribe is injured by the actions of the United States, since it was Tribal officials who, on a clearly timely basis, alerted Department officials that sections of the LCO Constitution were not properly applied by the Department to the Secretarial Election of February 1, 1992. Indeed, as regards the LCO Constitution, the Department, in its decision, states that individuals who are absentee voters can vote if they have one-half LCO tribal blood, because that was the blood quantum requirement at the time the LCO Constitution was enacted. It was, however, and remains the position of the Tribal Governing Board, that voter eligibility would be bound by the current Constitution, which precludes absentee voting by individuals, whether they live on or off the reservation, unless they are hospitalized, reside in a nursing home, or are serving in the Armed Forces. LCO Constitution, Article IV, Section 3(c).[17] Clearly, these are fundamentally different positions as to the requirements of the LCO Constitution, especially when the Plaintiffs are asserting that the United States officials did something wrong, which if done differently would have resolved the matter in its entirety. The fact that the United States ultimately advocated

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[17] As noted in the Opening Brief of Tribal Governing Board members before the Seventh Circuit at page 18: "Absentee voting constituted the majority of the votes tabulated in the disputed election and there was no effort whatsoever to limit voting to those hospitalized in nursing homes or in the armed forces. Only 12% of those eligible on the Reservation voted, not 30% as required. There were no tribal membership hearings on informational matters. The BIA misaddressed registration materials."

results urged by the Tribal Governing Board does not mean that the Tribe lacks its own unique interest with respect to the Federal Defendants.

3. There is a Legally Cognizable Risk of Incomplete Relief that is So Strong that this Suit Must Be Dismissed in the Absence of the Tribal Governing Board.

The Seventh Circuit essentially found no risk of incomplete relief to warrant dismissal of the action in the absence of the Tribal Governing Board, because the Board "has no legal authority to refuse to implement amendments to the tribal constitution that have been put to a vote and approved by the Secretary." Thomas v. U.S., 189 F.3d at 668, Appendix at A-10. However, an analysis of whether a legally cognizable risk of incomplete relief exists that asks only whether the Tribe will disobey the law misses the point. A proper analysis must take into consideration the fact that one of the amendments in controversy recognizes and requires the exercise of judgment and discretion by the Tribal Governing Board ("The Governing Board shall enact the ordinance subject to the approval of the Secretary of Interior stating the criteria for future membership and adoption of the new members. Such ordinance shall include .."). Appendix at A-82 (emphasis added). In other words, this proposed amendment directs the Tribal Governing Board to assume its sovereign obligation and exercise its discretion in framing an ordinance dealing with the issue under consideration. Indeed, the Tribal Governing Board, acting properly within the realm of its sovereign discretion, could formulate an ordinance that the Plaintiffs find unsatisfactory. Therefore, complete relief simply cannot be granted in the absence of the very party

which is being asked to exercise its discretion with respect to the amendment at issue.[18]

In determining that proceeding without the Tribal Governing Board poses no risk of incomplete relief, the Seventh Circuit analogized that to find otherwise would be tantamount to saying that (1) a warden who could refuse to imprison a convicted criminal is a necessary party in every criminal case, or (2) all state municipalities are necessary parties whenever state referendums are conducted in court, because they might rebel against the court's disposition of the case. Thomas v. U.S., 189 F.3d at 668, Appendix at A-10. However, as noted above, the question of whether a legally cognizable risk of incomplete relief exists turns not upon mere analogies, but rather upon a fair analysis of where the responsibility of Tribal government lies. Here, the crux of the matter is that the court cannot grant full relief because such relief depends, in part, upon an exercise of the Tribe's sovereign responsibilities to its membership in exercising its discretion as to the very issue under consideration.

II. THE DECISION OF THE SEVENTH CIRCUIT CONFLICTS WITH THIS COURT'S DECISION IN SEMINOLE TRIBE OF STATE OF FLORIDA V. FLORIDA, 517 U.S. 44 (1986) AND THE DECISION OF THE ELEVENTH CIRCUIT IN FLORIDA V. SEMINOLE TRIBE OF FLORIDA, 181 F.3D 1237 (11TH CIR. 1999).

In Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), this Court held that despite the clear intent of

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[18] As a solution to the possibility that incomplete relief might yet exist, the Seventh Circuit suggests that the Tribe might earlier have sued the Department of the Interior. However, such solution impermissibly adds another criterion to the necessary party analysis under Fed. R. Civ. P. 19(a). See later discussion under section III.

Congress in the Indian Gaming Regulatory Act ("IGRA"), at 25 U.S.C. § 2710, to allow an American Indian Tribes to initiate legal action against a State for failure to negotiate a gaming compact in good faith, the Eleventh Amendment to the United States Constitution precluded Congress from authorizing such lawsuits by Indian tribes against states. Had this Court therein utilized the same rationale as the Seventh Circuit, it would have noted that an action relating to the failure of a State to enter into a Compact, despite the Congressional directive that it do so, and despite the exercise of the State's immunity, would have allowed the Tribe to bring an action against the National Indian Gaming Commission, as regulator, (see 25 U.S.C. § 2704) to compel it to declare that a compact exists. Instead, this Court found that the State's exercise of governmental immunity was dispositive, and that the lack of an ability to address the question originally brought to the Court would not permit an action addressing the subject matter. Indeed, this Court rejected the conclusion that the issue brought to its attention under federal law could be determined in the absence of a State.

By way of contrast, the Seventh Circuit took a decidedly different approach and, upon agreeing with the District Court that the Tribe had properly exercised its sovereign immunity, found that the case could nevertheless proceed in the Tribe's absence. Under the Seventh Circuit's approach, if a State exercised sovereign immunity to be dismissed from a lawsuit, the District Court could, nevertheless, should an additional Defendant remain, declare the responsibilities of all who had interest in the subject matter of the lawsuit,[19] and enforce any decision as against the State by way of injunction.

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[19] The Seventh Circuit recognizes that "[t]he governing board...indisputably has an interest in the subject matter of the suit..." Thomas v. U.S., 189 F.3d at 12.

The Seventh Circuit does not discuss the approach utilized by this Court in Seminole. However, the interests of the Tribal Governing Board herein are superior to Florida's interests in Seminole because of the paramount interest of a Tribe in the determination of its membership, as compared to the limited role a State has to govern activities on an Indian Reservation within a State. This Court proclaimed the Eleventh Amendment rights of a State, as well as the sovereign rights of a Tribe, finding that the Congressional approach was not permitted. But this Court did not take the additional step of telling the State that a federal court could determine the matters at issue in its absence, and, further, that if the State declared its immunity, a federal court could nevertheless proceed, if warranted, to issue an injunction. In short, under Seminole, when the immunity of a governmental body is recognized, that immunity cannot be circumvented by a court's consideration of the merits of a case with the governmental body being absent, if relief includes direction to that entity to do something.

In State of Florida v. Seminole Tribe of Florida, 181 F.3d 1237 (11th Cir. 1999), the State of Florida sued the Seminole Tribe, and its Chairman, for a declaration that the Tribe was conducting illegal Class III gaming operations, and for an injunction that would prohibit such operations in the absence of a Tribal-State compact. The Eleventh Circuit affirmed the District Court, holding that dismissal was proper on the ground of Tribal sovereign immunity. En route to its decision, the Eleventh Circuit recognized that this Court had held that the principle of sovereign immunity contained within the Eleventh Amendment barred the Seminole Tribe from suing the State of Florida for the alleged failure to negotiate in good faith toward the formation of a Tribal-State gaming compact. At the outset, the Eleventh Circuit made it clear that "[t]his case.., demonstrates the continuing vitality of the venerable maxim that turnabout is fair play." Id. at 1239. The Eleventh Circuit recognized that this Court has recently

reaffirmed the doctrine of tribal sovereign immunity. Id. at 1244-45, citing Kiowa Tribe v. Manufacturing Techs., Inc., 523 U.S. 751 (1998) ("As a matter of federal law, an Indian tribe is subject to suit *only where* Congress has authorized the suit or the tribe has waived its immunity." (emphasis in original)). Further, although the State of Florida was concerned that it would be left with no forum in which it could prevent the Tribe from violating IGRA, the Eleventh Circuit recognized that "it is far from clear that 'tribal [sovereign] immunity [must give way to] federal jurisdiction when no other forum is available for the resolution of claims."[20]

The instant determination of the Seventh Circuit, reversing the District Court, conflicts with the determination in Seminole, ibid, by the Eleventh Circuit. Rather than recognizing, as did the Eleventh Circuit, that the exercise of sovereign immunity by a Tribe may result in a lack of a forum to address an issue, the Seventh Circuit presupposes that a forum must be available, even in the Tribe's absence, should a party initiate action against a Tribal government. Such rationale serves to undermine Tribal sovereignty.

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[20] State of Florida, 181 F.3rd at 1243-1244 (citing Fluent v. Salamanca Indian Lease Auth., 928 F.2d 542, 547 (2d Cir. 1991) (rejecting this proposition)); accord Ute Distrib. Corn. v. Ute Indian Tribe, 149 F.3d 1260, 1266 n. 8 (10th Cir. 1998) ("The proposition that tribal immunity is waived if a party is otherwise left without a judicial remedy is inconsistent with the reasoning of Santa Clara Pueblo"); Makah Indian Tribe, 910 F.2d at 560 ("Sovereign immunity may leave a party with no forum for its claims").

III. THE DECISION OF THE SEVENTH CIRCUIT INTERJECTS AN ADDITIONAL CRITERION INTO THE NECESSARY PARTY ANALYSIS THAT IS NOT SPECIFIED UNDER FED. R. CIV. P. 19, THUS CONFLICTING WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL ON THE SAME IMPORTANT MATTER.

The Seventh Circuit interpreted Rule 19 to mean the Tribe would first have had to bring suit against the Federal Government in order to be considered a necessary party. However, this interpretation has the effect of adding a new criterion to the Rule 19 analysis. Fed. R Civ. P. 19.[21] Yet,

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[21] The rule provides that a party is a necessary party if: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. See also Teamsters Local Union No. 171 v. Keal Driveaway, 173 F.3d 915,917 n. 1 (4th Cir. 1999); Angst v. Royal Maccabees Life Ins. Co, 77 F.3d 701, 705 (3rd Cir. 1996); Local 670 v. Int. U.. United Rubber, Etc.. Workers, 822 F.2d 613, 618 (6th Cir. 1987); Aguilar v. Los Angeles County, 751 F.2d 1089, 1091-92 (1985).

As the Seventh Circuit concluded that the Tribal Governing Board is not a necessary party, it did not undertake the indispensable party analysis under Fed. R. Civ. P. 19(b). "If an absent party is necessary but cannot be joined, the district court must ascertain 'whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed.'" Davis v. U.S., 192 F.3d 951 (10th Cir. 1999), citing Fed. R. Civ. P. 19(b).

"Rule 19(b) enumerates four factors which must be weighed by the District Court when determining whether in equity and good conscience a suit can proceed in the absence of a necessary party: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already rendered parties; second, the extent to which, by protective provisions in the judgment by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a

despite the absence of such a criterion among those specified in Rule 19, the Seventh Circuit decision suggests that a determination of whether a party is necessary or not hinges, to a large extent, on whether that party took prior legal action to have courts review the legality of the controversy at issue: "At this point the board is trying to leverage its failure to follow the prescribed statutory procedures into an unreviewable decision to disapprove the election." Thomas v. U.S., 189 F.3d at 11. The Seventh Circuit here distorts the facts considerably, for as the Seventh Circuit itself acknowledges, "[f]ollowing the statutory procedure, LCO member Odric Baker and Tribal Governing Board Chairman [g]aiashkibos both filed challenges to the election results within the permitted three-day window, but they were unsuccessful." Thomas v. U.S., 189 F.3d at 3. Actually, they were successful as the Department on October 7, 1992, acting through David Matheson, the then-Acting Assistant Secretary for Indian Affairs, set aside the Secretarial Election as being "fatally flawed" arising from failure by the Department to limit voting to the proper class. In other words, according to the Seventh Circuit, the Tribe must not rely on the Department, but must instead sue the Department in order for it to be considered a necessary party as to a lawsuit initiated against it four years thereafter.

There is something deeply troubling about the Seventh Circuit's reasoning, which implies that, in order to be considered a necessary party under Rule 19, the Tribal Governing Board would need to have sued the very Department, charged under its trust responsibility to serve the

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judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." Id.

The District Court's Rule 19(b) analysis, under which it determined that the Tribal Governing Board is an indispensable party, may be found at Thomas v. U.S., No. 96-C-0828-C (W.D. Wis., March 27, 1998), Appendix at A-28 through A-30.

Tribe's best interests, seeking a judicial determination as to how the Department was to proceed, all while the Department had the matter under consideration. The Tenth Circuit has recognized, "[t]he right to conduct an election without federal interference is essential to the exercise of the right to self-government." Wheeler, 835 F.2d at 261. Such review should be undertaken in conformity with the Department's fiduciary responsibility as a matter of standard procedure. The Tribe should not be saddled with responsibility for errors of the Department. Yet, the Seventh Circuit's decision more than hints that the Tribe would need not only to have challenged the Department in a separate legal action, but to have lost as well, in order to be considered a necessary party. A decision with such drastic implications as to the relationship both between American Indian Tribes and their members, and between Tribes and the United States should not be allowed to stand without further review.

CONCLUSION

In this action, initiated by Plaintiffs four years following a secretarial election, conducted by the U.S. Department of Interior, relating to amendment of Petitioner Indian Tribe's Constitution, the United States Court of Appeals for the Seventh Circuit, in reversing the District Court, ignored the right of the Tribe to the continuity of its constitutional government. The Seventh Circuit's conclusion that the Tribe is not a necessary party is contrary to law established by this Court, and further conflicts with other circuits. Moreover, the additional requirement it would place upon a Tribal Government in order for it to be considered a necessary party in litigation affecting vital interests of the Tribe is contrary to Rule 19 of the Federal Rules of Civil Procedure as it has been universally interpreted.

For the foregoing reasons, this Petition should be granted and a Writ of Certiorari issued herein to the United States Court of Appeals for the Seventh Circuit.

Dated this 13th day of March, 2000

Respectfully submitted,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT BY PETITIONER TRIBAL GOVERNING BOARD OF THE LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS

Thomas v. U.S., No. 98-2329, United States Court of Appeals for the Seventh Circuit, Decided September 7, 1999 ..... A-1

Thomas v. U.S., No. 96-C-0828-C, United States District Court for the Western District of Wisconsin, April 10, 1998 ..... A-14

Thomas v. U.S., No. 96-C-0828-C, United States District Court for the Western District of Wisconsin, Entered March 27, 1998 ..... A-17

Thomas v. U.S., No. 96-C-0828-C, United States District Court for the Western District of Wisconsin, Entered October 14, 1997 ..... A-38

Thomas v. U.S., No. 98-2329, United States Court of Appeals for the Seventh Circuit, Order on Rehearing, Decided December 13, 1999 ..... A-58

October 7, 1992 Letter from David Matheson, Acting Assistant Secretary - Indian Affairs to Gaiashkibos, Chairman, Lac Courte Oreilles Tribal Governing Board .. A-59

Selected Provisions (Articles I-IV) of the Current Amended Constitution and Bylaws of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin A-73

Proposed Amendments to Article II, Section 2 and Article IV, Section 4 of the Constitution and Bylaws of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians that are at the heart of this controversy A-82

In the
United States Court of Appeals
for the Seventh Circuit

No. 98-2329

SANDRA THOMAS, *et al.*,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 96-C-828-C—**Barbara B. Crabb**, *Judge.*

ARGUED DECEMBER 1, 1998—DECIDED SEPTEMBER 7, 1999

Before COFFEY, ROVNER, AND DIANE P. WOOD, *Circuit Judges.*

DIANE P. WOOD, *Circuit Judge.* Indian tribes enjoy important attributes of sovereignty, but in some key respects they are under the control of the federal government. Such is the case with elections to adopt, revoke, or amend tribal constitutions. Although these elections lay the very foundation for tribal self-governance, they must be called, held, and approved by the United States Secretary of the Interior. 25 U.S.C. § 476.

In February 1992, the Secretary conducted such an election to ratify two amendments to the tribal constitution of the Lac Courte Oreilles ("LCO") Band of Lake Superior Chippewa Indians. Both amendments were approved overwhelmingly, and initial challenges to the results were unsuccessful. Later, however, at the instigation of the losing faction, federal officials overturned the election results. That led to this lawsuit by four LCO members and ancillary members who supported the amendments. Their complaint contested the legality of the federal officials' actions under the Indian Reorganization Act ("IRA"), 25 U.S.C. § 461 *et seq.*, and the judicial review portion of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* The district court, believing that the tribal government was a party without whose presence the case could not go forward under the standards of Federal Rule of Civil Procedure 19, dismissed the action when the tribal governing board refused to join the suit voluntarily and asserted its sovereign immunity to ward off involuntary joinder. We find, to the contrary, that Rule 19 does not compel the governing board's presence, and we therefore reverse.

I

In the late 1980s, some LCO members began considering possible amendments to their tribal constitution that would alter the standards for tribal membership as well as the structure of tribal government. In 1988, plaintiff Sandra Thomas (an LCO member who lives on the reservation, with at least 9/32 LCO blood) was named chairperson of a committee formed to explore these issues. This committee eventually drafted four proposals, which were circulated among the LCO membership and sent to the Bureau of Indian Affairs ("BIA"), the responsible division within the

Department of the Interior, to begin the amendment ratification process.

The procedures for calling and approving an election to amend a tribal constitution are codified at 25 U.S.C. § 476 and are relatively straightforward. Once the Secretary receives a qualifying request to hold an election to ratify proposed amendments, the Secretary reviews the legality of the proposed amendments and calls an election within 90 days. 25 U.S.C. § 476(c)(1)(B); 25 C.F.R. § 81.5(d). The election results are not binding until the Secretary approves them, and any qualified voter may contest the results to the Secretary within three days of the election. 25 C.F.R. § 81.22. The Secretary has 45 days to resolve these election contests, conduct an independent review, and approve or disapprove the election. 25 U.S.C. § 476 (d)(1). This section of the IRA also provides a private right of action to enforce the statutory scheme in federal district court. *Id.*

On November 5, 1991, the BIA approved two of the petitions submitted by Sandra Thomas in her capacity as "Spokesman for the petitioners" pursuant to 25 C.F.R. § 82.1(o), and called an election. Proposed Amendment A redefined tribal membership in terms of lineal descendancy rather than blood quantums; Proposed Amendment B lengthened the terms of office for elected tribal officials. The election took place on February 1, 1992, and both amendments passed handily: Amendment A carried by a margin of 542 to 105, and Amendment B by a margin of 373 to 274. Following the statutory procedure, LCO member Odric Baker and Tribal Governing Board Chairman Gaiashkibos both filed challenges to the election results within the permitted three-day window, but they were unsuccessful. On February 10, 1992, Michael A. Fairbanks, the Acting Area Director for the BIA, formally approved the amendments to the LCO tribal constitution.

At this point, Gaiashkibos continued his opposition to the election results through less orthodox methods. On April 16 and April 24, 1992 (well beyond the 3-day time period provided by 25 C.F.R. § 81.22 to challenge a Secretarial election, and a month or more after the end of the 45-day period within which the Secretary had to approve or disapprove the election under 25 U.S.C. § 476(d)(1)), he sent letters to Dr. Eddie F. Brown, then-Assistant Secretary of the Interior for Indian Affairs, asking that the decision to approve the election results be reviewed and reversed. Gaiashkibos argued that the election procedures had not conformed to the requirements of the tribal constitution and that not all eligible voting members had been informed of the election. On April 18, 1992, the tribal governing board passed a resolution refusing to recognize the new constitutional amendments.

On October 7, 1992, in response to Gaiashkibos's persistent efforts, David Matheson, who was then serving as Deputy Commissioner of the BIA, purported to revoke the Department's prior approval of the election. He noted that the tribal governing board did not have the authority to declare Secretarial election results void, but he agreed that the election was indeed flawed. Matheson explained that elections to amend tribal constitutions had to be conducted in the same manner as the original election to adopt the constitution itself, but that a large percentage of the 1992 LCO voters did not meet the voting criteria for the original LCO constitutional election. Matheson also indicated that a new election would have to be held, in which only LCO members meeting the original voting criteria could vote. (Despite this, a replacement election has yet to take place.)

After various unsuccessful efforts to persuade federal officials and the tribal governing board to reverse course and accept the election results or at least hold a new election, on October 2, 1996, the plaintiffs filed the current action in federal district court. As relevant here, they made three

claims: First, they alleged that the federal defendants exceeded their statutory authority under 25 U.S.C. § 476(d)(1) when they disapproved the election after the 45-day statutory review period had lapsed. Second, they challenged the Department's action as arbitrary and capricious under the APA. See 5 U.S.C. § 706(2). Third, they maintained that the federal defendants had breached the general trust relationship between the United States and the Indian people. See *United States v. Mitchell,* 463 U.S. 206, 224-26 (1983). (The plaintiffs also brought a *Bivens* claim against Brown and Matheson, but the district court dismissed that claim for lack of personal jurisdiction and the plaintiffs did not address that determination in their opening brief. The *Bivens* claim is therefore waived. *International Oil, Chem. & Atomic Workers, Local 7-517 v. Uno-Ven Co.,* 170 F.3d 779, 783 (7th Cir. 1999).) The plaintiffs did not name the LCO tribal governing board as a defendant to their suit.

The federal defendants filed a number of jurisdictional and procedural objections, among them the contention that the tribal governing board was a party "needed for just adjudication," without which the case could not proceed, under Rule 19. In an order issued October 14, 1997, the district court agreed that the board's presence was required under Rule 19(a), but it temporarily denied the defendants' motion to dismiss under Rule 12(b)(7) for failure to join a party under Rule 19. The court noted that the governing board might join the lawsuit as a plaintiff or be named as a defendant, either of which would avoid the need for dismissal. Although Indian tribes possess sovereign immunity, they, like the states, are also free to waive their immunity. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978); *cf. Wisconsin Dept. of Corrections v. Schacht,* 118 S.Ct. 2047, 2052 (1998). Upon consideration of the matter, the LCO tribal governing board declined to join the suit as a plaintiff. The plaintiffs responded with an amended complaint, filed on November 26,

1997, in which they named the members of the tribal governing board as defendants in both their official and individual capacities. The amended complaint restated all of the claims in the original complaint, added a request for declaratory relief against the tribal defendants in their official capacities under the IRA and individually under the *Ex parte Young* doctrine, and sought damages from the tribal defendants individually under 42 U.S.C. § 1985(3) on the theory that the tribal board members had conspired to deprive them of rights secured by the United States Constitution.

Both the federal defendants and the tribal defendants moved to dismiss, and this time the district court granted the motions on March 27, 1998. The court dismissed any claims against the governing board as barred by its sovereign immunity. It dismissed the IRA and APA claims against the federal defendants for failure to join a party required by Rule 19. Last, it rejected the plaintiffs' IRA and § 1985 allegations against the tribal defendants for failure to state a claim.

II

On appeal, the plaintiffs have devoted most of their energy to their attack on the district court's Rule 19 determinations. This court has considered, but not yet decided, whether to review decisions under Rule 19 *de novo* or for an abuse of discretion. *North Shore Gas Co. v. Salomon, Inc.*, 152 F.3d 642, 648 (7th Cir. 1998); *United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 478 (7th Cir. 1996) (collecting cases). Respectable arguments can be made in favor of each standard, see *Sokaogon Chippewa Community v. State of Wisconsin*, 879 F.2d 300, 303-04 (7th Cir. 1989), as the diversity of views among the circuits illustrates. Compare, *e.g.*, *Koppers Co., Inc. v. The Aetna Cas. & Surety Co.*, 158 F.3d 170, 174 (3d Cir. 1998) (reviewing Rule 19(a) determinations *de novo* and Rule 19(b)

determinations for an abuse of discretion) with *Keweenaw Bay Indian Community v. State of Michigan*, 11 F.3d 1341, 1346 (6th Cir. 1993) (reviewing Rule 19(a) determinations for an abuse of discretion but Rule 19(b) determinations *de novo*). In the cases we have thus far encountered, the result would have been the same using either standard of review. See *North Shore Gas*, 152 F.3d at 648; *Hall*, 100 F.3d at 478; *Sokaogon Chippewa*, 879 F.2d at 304. This one is no different. Because the district court made a legal error in its analysis, we would reverse its determination under either standard. We therefore once again postpone resolving the question of the proper standard of review in Rule 19 cases for a day when that issue is of some consequence to the outcome.

Rule 19 sets up a two-step inquiry. First, the court must determine whether a party is one that should be joined if feasible called, in the old days, a "necessary" party. Fed. R. Civ. P. 19(a); *Hall*, 100 F.3d at 478. To answer that question, the court must consider (1) whether complete relief can be accorded among the parties to the lawsuit without joinder, (2) whether the absent person's ability to protect its interest in the subject-matter of the suit will be impaired, and (3) whether any existing parties might be subjected to a substantial risk of multiple or inconsistent obligations unless the absent person joins the suit. Fed. R. Civ. P. 19(a). Only if the court concludes, based on those factors, that the party should be included in the action but it cannot be, must it go on to decide whether the litigation can proceed at all in the party's absence. See Fed. R. Civ. P. 19(b). If there is no way to structure a judgment in the absence of the party that will protect both the party's own rights and the rights of the existing litigants, the unavailable party is regarded as "indispensable" and the action is subject to dismissal upon a proper motion under Federal Rule of Civil Procedure 12(b)(7).

In this case, the district court concluded that the tribal governing board had to be joined under Rule 19(a) primarily

because "[t]he proposed amendments deal with matters of fundamental importance to the tribe." The court also expressed concern that it could not afford complete relief, because the governing board could again refuse to enforce the amendments even if the Secretary, as a result of this suit, approved the election results. Finally, the court noted the risk that the BIA might be exposed to additional litigation over the same election if it approved the election results and the governing board later sued it in an attempt to win a reversal. While the court correctly followed the formal structure of a Rule 19(a) inquiry by focusing on the missing party's interest, the adequacy of relief, and the possibility of incompatible obligations, we believe its reasoning fundamentally misapprehends the limited role of the tribal government in a federal Secretarial election.

At its base, this lawsuit is a challenge to the way certain federal officials administered an election for which they were both substantively and procedurally responsible. It bears emphasizing that Secretarial elections, such as the one at issue here, are federal – not tribal – elections. 25 C.F.R. § 81.1(s). Tribes are sovereign only to the extent that their sovereignty has not been qualified by statutes or treaties. *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 14 (1987). The IRA explicitly reserves to the federal government the power to hold and approve the elections that adopt or alter tribal constitutions. 25 U.S.C. § 476. As the Eighth Circuit explained, "[i]t is not merely the number or type of federal involvements which characterize these elections as federal . . . . Rather, it is the source of the Secretary's regulatory authority over these elections, such authority having congressional[,] and not tribal, origin." *Cheyenne River Sioux Tribe v. Andrus,* 566 F.2d 1085, 1088 (8th Cir. 1977). The Secretary's powers to disapprove an election upon the filing of a proper challenge are very broad, and can include flaws in the make-up of the

eligible electorate. See *Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt,* 107 F.3d 667 (8th Cir. 1997).

One can question the wisdom of retaining federal control over matters of such fundamental importance to the tribe as its own constitutional ratification and amendment process. See Timothy W. Joranko & Mark C. Van Norman, *Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments,* 29 Gonz. L. Rev. 81 (1993/94). Nonetheless, the balance of power that Congress struck in this context is the compass we must follow for determining the legal significance of the tribal interest under Rule 19(a). We accept the fact that tribes have a strong interest in matters, like Proposed Amendment A, that relate to membership, *Santa Clara Pueblo,* 436 U.S. at 71 n.32, but the fact that a tribe has an interest in the litigation is not enough in itself to make it a necessary party in the sense of Rule 19. See *State of Washington v. Daley,* 173 F.3d 1158, 1167-69 (9th Cir. 1999).

Here, the decision of Congress to privilege federal control over tribal interests in tribal constitutional elections is unmistakable. The language and structure of the statute leave no doubt where authority lies, and debates within Congress are entirely consistent with our conclusion. As recently as 1988, the Department of the Interior urged Congress to entrust the amendment process to the tribes, arguing that "Secretarial involvement in the calling of elections and approval of constitutions and bylaws, and amendments to them, is not consistent with the policy and goal of tribal self-determination. . . . Any challenges to tribal elections of tribal governing documents should be resolved through a tribal process in the tribal forums." Comments of Assistant Secretary of the Interior on H.R. 2677, S. Rep. No. 577, 100th Cong., 2d Sess. 34-35 (1988), reprinted in U.S.C.C.A.N. 3908, 3924-25. But Congress rejected this recommendation and instead passed the current version of 25 U.S.C. § 476,

which establishes the present version of the Secretarial election process. Congress thereby refused to reflect the tribal interest in the legal structure of tribal constitutional elections, notwithstanding the core values of government and self-determination that a tribal constitution necessarily embodies. Following the path laid out by Congress, we conclude that the district court erred in finding the governing board had to be included in the lawsuit based on the depth of the tribe's interest in the matters addressed in the Secretarial election.

Nor are we persuaded that there is a legally cognizable risk of incomplete relief that is so strong that this suit must be dismissed in the absence of the tribal governing body. As BIA Deputy Commissioner Matheson noted in his belated September 1992 letter withdrawing the approval of the election results, and as we agree, the tribal governing board has no legal authority to refuse to implement amendments to the tribal constitution that have been put to a vote and approved by the Secretary. To say that the governing board must be a party because it might unlawfully refuse to implement the election results is not so different from saying that a warden is a necessary party in every criminal case, because she might unlawfully refuse to imprison a convicted criminal. Or, somewhat closer to the facts of this case, it would be like saying that all of a state's municipalities are necessary parties whenever a state referendum is contested in court, because any one of them might refuse to honor the court's disposition of the case – even though they are of course bound to implement state law, regardless of whether an election, administrative action, or court opinion last shaped that law. Indeed they might rebel, but joinder is not the appropriate vehicle to remedy such possible disobedience. Instead, the normal enforcement mechanisms, such as injunctions, are the proper choice.

These same considerations make the district court's concern with the possibility of a later suit by the governing

board unpersuasive. The tribal governing board's interest in a lawful administrative process under 25 U.S.C. § 476 is equivalent to that of the plaintiffs. *Cf. Makah Indian Tribe v. Verity,* 910 F.2d 555, 559 (9th Cir. 1990) (finding that absent tribes affected by the subject-matter of disputed regulations were not necessary parties to adjudicating a claim that the Secretary had followed flawed procedures in promulgating the regulations because "all of the tribes have an equal interest in an adjudicative process that is lawful."). Moreover, the governing board has no special legal status in regard to the Secretarial election that gives it a different position from which to mount a post-election challenge than that held by any other group of tribal voters. See 25 C.F.R. § 81.22 ("[A]ny qualified voter . . . may challenge the election results....").

In fact, to the extent that anyone has a special legal status in regard to this election that should be taken into account, it is plaintiff Sandra Thomas, who served as spokesperson for the amendment petitions pursuant to 25 C.F.R. § 82.1(o). To conclude, then, that the risk of a subsequent lawsuit by the governing board requires it to be added as a necessary party would be tantamount to holding that all voters are necessary parties whenever a subset of voters brings an election contest, because they have the same standing to sue and might some day exercise it. That would be an absurd result, and one at odds with the more concrete concerns that animate the inconsistent-obligation prong of the Rule 19(a) inquiry. See generally Wright, Miller & Kane, 7 Federal Practice & Procedure § 1604 (discussing the purposes underlying the Rule 19(a) joinder criteria).

After its challenges were rejected, the board could itself have brought an action to test the Secretary's approval of the election; but no one did any such thing. At this point, the board is trying to leverage its failure to follow the prescribed statutory procedures into an unreviewable decision to

disapprove the election, by taking advantage of Rule 19. We cannot condone this kind of ploy, especially because, as 25 U.S.C. § 476(b) states, "[a]ny constitution or bylaws ratified and approved by the Secretary shall be revocable by an election open to the same voters and conducted in the same manner as provided in subsection (a) of this section for the adoption of a constitution or bylaws." The governing board need not be stuck with an illegitimate constitution, if that is indeed what it thinks resulted from the February 1992 vote. The statute prescribes precisely how it can obtain relief.

In sum, the respective roles of the federal government, the tribal government, and the tribal electorate under 25 U.S.C. § 476 dictate that the plaintiffs' suit against the federal officials who conducted the 1992 Secretarial election should not be dismissed because the tribal governing board cannot be made a party to the lawsuit. The governing board, though it indisputably has an interest in the subject-matter of the suit, is not a necessary party. This result in no way silences the governing board. If it wishes to advocate for its interest by participating in this lawsuit, there are procedural vehicles at its disposal that will even now allow it to do so, including a petition to intervene under Rule 24 and participation as *amicus curiae*. Finally, this result does not slam the courthouse door in the face of the plaintiffs, who seek only to invoke the judicial oversight of the Secretary's actions provided for in 25 U.S.C. § 476(d)(2).

One final note. The plaintiffs argue that they have stated proper claims against the tribal defendants under the IRA and 42 U.S.C. § 1985(3). At oral argument, however, plaintiffs' counsel assured us that the plaintiffs would have no interest in pursuing their claims against the tribal defendants were we to conclude that Rule 19 did not require their participation. We have reached that conclusion. Accordingly, we treat these claims as abandoned for the present time.

Because the tribal governing board is not a party whose joinder in this suit is required by Rule 19, we REVERSE and REMAND this case for further proceedings consistent with this opinion.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SANDRA THOMAS, TINA THOMAS, MICHAEL NALEWAJA, and ROBERT E. SANDER,

JUDGMENT IN A CIVIL CASE

Plaintiff(s),

Case No.: 96-C-0828-C

vs.,

UNITED STATES; UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS; BRUCE BABBITT, Secretary of the Interior, in his official capacity; Ada E. DEER, Assistant Secretary of the Interior of Indiana Affairs, in her official capacity; DR. EDDIE F. BROWN, Former Assistant Secretary of the Interior for Indian Affairs, individually and in his official capacity; and DAVID J. MATHESON, Former Deputy Commissioner of the Bureau of Indian Affairs, individually and in his official capacity; ,

Defendant(s).

And

GAIASHKIBOS; MICHAEL ISHAM, JR; DONALD E. CARLEY; ALFRED TREPANIA; MARGARET

DIAMOND; CONSTANCE CORBINE; and EUGENE BEGAY; individually and in their official capacities; and the TRIBAL GOVERNING BOARD of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians,

Joined Defendants.

This action came for consideration before the court with U.S. DISTRICT JUDGE BARBARA B. CRABB presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that:

1. Defendant Tribal Governing Board of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians is immune from suit by plaintiffs under the doctrine of sovereign immunity;

2. Plaintiffs' claims against defendant governing board are DISMISSED because the board is immune from suit;

3. Plaintiffs' first, second and fourth causes of action against defendants Babbitt, Brown, Deer and Matheson and plaintiffs' request for injunctive relief against defendants Begay, Carley, Corbine, Diamond, Gaiashkibos, Isham and Trepania are DISMISSED, pursuant to Fed.R.Civ.P.19(b);

4. Plaintiffs' first and second causes of action against defendants Begay, Carley, Corbine, Diamond, Gaiashkibos, Isham and Trepania are DISMISSED for lack of jurisdiction; and final judgment is entered in favor of DEFENDANTS and this case is CLOSED.

Approved as to form this 10th day of April, 1998.

s/
BARBARA B. CRABB,
U.S. DISTRICT JUDGE

s/ April 10, 1998
Joseph W. Skupniewitz, Clerk of Court Date

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

SANDRA THOMAS, TINA THOMAS, MICHAEL NALEWAJA, and ROBERT E. SANDER,

OPINION AND ORDER

Plaintiffs,

v. 96-C-828-C

UNITED STATES; UNITED STATES DEPARTMENT OF INTERIOR, BUREAU OF INDIAN AFFAIRS; BRUCE BABBITT, Secretary of the Interior, in his official capacity, ADA E. DEER, Assistant Secretary of the Interior for Indian Affairs, in her official capacity; DR. EDDIE F. BROWN, Former Assistant Secretary of the Interior for Indian Affairs, individually and in his official capacity; and DAVID J. MATHESON, Former Deputy Commissioner of the Bureau of Indian Affairs, individually and in his official capacity;

Defendants;

and

GAIASHKIBOS; MICHAEL ISHAM, JR.; DONALD E. CARLEY; ALFRED TREPANIA; MARGARET DIAMOND; CONSTANCE CORBINE; and EUGENE BEGAY; individually and in their official capacities; and the TRIBAL GOVERNING

BOARD of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians,

Joined Defendants.

This case arises out of a September 1992 election on two proposed amendments to the tribal constitution of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians. The amendments were passed by a majority of voters, but the Bureau of Indian Affairs determined later that the election was not conducted pursuant to the tribal constitution and declared the amendments void. Plaintiffs are members and ancillary members of the tribe who favor the amendments. In October 1996, plaintiffs initiated this action against Department of Interior and BIA officials and later added claims against the tribal governing board and its members. Plaintiffs assert that defendants committed a variety of statutory and constitutional violations. They seek injunctive and declaratory relief reinstating the election results, together with compensatory damages and attorney fees.

In an opinion and order entered October 14, 1997, I found that plaintiffs have standing to pursue their claims for declaratory and injunctive relief against government defendants and that personal and subject matter jurisdiction exists in relation to these claims, but that personal jurisdiction was lacking as to defendants Brown and Matheson, who were sued in their individual capacities for damages. Also, I found that with respect to plaintiffs' claims for declaratory and injunctive relief enforcing the amendments, the tribe's governing board was a necessary party pursuant to Fed. R. Civ. P. 19(b). Accordingly, proceedings were stayed so that the governing board would have an opportunity to intervene or, alternatively, to allow plaintiffs to amend the complaint to include the governing board and its members as defendants.

When the governing board chose not to intervene, plaintiffs chose the second alternative.

Presently before the Court are a variety of motions by government and tribal defendants, all requesting dismissal of the amended complaint. Defendant governing board asserts that it is entitled to sovereign immunity. Also, there is the issue left open in the October 14 opinion and order: whether plaintiffs' claims for declaratory and injunctive relief in relation to the 1992 amendments must be dismissed pursuant to Rule 19(b) because the governing board is an indispensable party. In addition, defendants board members assert that subject matter jurisdiction is lacking, that plaintiffs have failed to state a claim upon which relief may be granted, that they are entitled to sovereign immunity and that they are entitled to official immunity.

In the October 14 opinion and order, I made extensive findings of undisputed facts. Although plaintiffs have amended the complaint, they have made no additional allegations, aside from the identities of the added tribal defendants, which are not contested. I have identified below those undisputed facts within the October 14 opinion and order that are material to these motions; included in these facts are the identities of added tribal defendants taken from the amended complaint. However, tribal defendants have submitted additional documentary evidence in support of their motions. Plaintiffs do not challenge this evidence substantively, although they suggest that defendants have violated local court rules by failing to submit proposed findings of fact incorporating this evidence. Such proposals were not required because defendants are not moving for summary judgment. When addressing jurisdiction-related matters, a court may look to documentary evidence outside the pleadings without converting the motion into a motion for summary judgment. See Crawford v. United States, 796 F.2d 924, 928 (7th Cir. 1986) (noting the difference between a

"jurisdictional determination" and "summary judgment"). Accordingly, in addition to the undisputed facts found previously, I have identified separately these jurisdictional facts.

UNDISPUTED FACTS

A. The Tribe's Organization and Membership

The Lac Courte Oreilles Band of Lake Superior Chippewa Indians adopted its tribal constitution in 1966, pursuant to the Indian Reorganization Act, 25 U.S.C. §§ 461-479. Several amendments have been made since adoption, but as of 1992 the tribal constitution provided that Lac Courte Oreilles members comprise the following classes of individuals: (1) all persons of tribal blood who were listed on the tribe's 1940 census roll or were eligible to be included on that roll; (2) any lineal descendent of a member born before 1966; and (3) persons who have at least 1/4 tribal blood and have applied for membership under tribal ordinance. As of February 1992, the tribe had 4,378 members, of whom 3,659 were eligible to vote. Also, 1,127 persons were listed on the tribe's ancillary roll, which includes the children of Lac Courte Oreilles members who do not meet any of these membership requirements.

B. The Parties

Plaintiff Sandra Thomas is a Lac Courte Oreilles member who lives within the reservation. Plaintiff Tina Thomas is the daughter of plaintiff Sandra Thomas. She lives within the reservation and is listed on the ancillary roll. Plaintiffs Robert E. Sander and Michael Nalewaja are members who live outside the reservation.

Defendants Department of Interior and Bureau of Indian Affairs are executive agencies of the United States with authority to oversee relations between the United States and the various Indian tribes. Defendant Bruce Babbitt is Secretary of the Interior. He is named in his official capacity. Defendant Ada E. Deer is the Assistant Secretary of the Interior for Indian Affairs and is named in her official capacity.[†] Defendant Eddie F. Brown was the Assistant Secretary of the Interior for Indian Affairs in 1992 and is named in his official capacity. Defendant David Matheson was the Deputy Commissioner of the BIA in 1992 and is named in his official capacity.

Defendant Tribal Governing Board of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians is the official governing body of the tribe. Defendants Eugene Begay, Donald E. Carley, Constance Corbine, Margaret Diamond, Gaiashkibos, Michael Isham, Jr., and Alfred Trepania are the current members of the governing board. They are named as individuals and in their official capacities.

C. The Proposed Amendments and the Election

After three years of work by a special committee, which was chaired by plaintiff Sandra Thomas, the local BIA office authorized an election on two petitions for amendments to the tribal constitution that had been submitted by tribal members at large. Plaintiff Sandra Thomas served as the "Spokesman for the petitioners," pursuant to 25 C.F.R. § 82.1(o). Proposed amendment A eliminated the 1/4 Lac Courte Oreilles blood membership requirement and opened tribal membership to any descendant of a member. Proposed amendment B extended the term-length of governing board

[†] Defendant Deer resigned from office after the filing of this lawsuit. The parties have not advised the court of the name of her successor or whether there is one.

members to four years. Both amendments passed by a majority of the voters at the February 1, 1992 election.

D. Post-Election Proceedings

After the election, defendant Gaiashkibos, who then served as chairman of the governing board, questioned the results. On February 3, 1992, he sent a letter to the local BIA office regarding whether a provision within the tribal constitution had been satisfied; this provision required that at all amendments be passed by at least 30% of the eligible voters. On February 5, 1992 another Lac Courte Oreilles member sent a letter to the local BIA office challenging some of the registration procedures. The local BIA office rejected both complaints and approved the amendments. On February 10, 1992, the office sent written notice to plaintiff Sandra Thomas, as spokesperson for the petitions, and to defendant Gaiashkibos.

Although the amendments were approved by the BIA, controversy continued over them. Some copies of the tribal constitution were printed to include the new amendments, but when plaintiff Sandra Thomas contacted the governing board to learn how ancillary members would obtain full membership, which they now could obtain under the amended constitution, she could not get an answer. On April 18, 1992, the governing board passed a resolution to "not recognize" the two new amendments. In addition, on April 16 and 24, defendant Gaiashkibos sent letters to defendant Brown, seeking review of the decision to approve the election results. Defendant Gaiashkibos argued that the election had not been conducted pursuant to certain provisions of the tribal constitution and that not all of the voting eligible members had been informed of the vote because of a clerical error made by the local BIA office.

On April 23 and 24, plaintiff Sandra Thomas also wrote to defendant Brown. In her first letter, she notified him about the governing board's rejection of the amendments. In the second letter, she responded directly to defendant Gaiashkibos's concerns and complained to defendant Brown that the three-day time period allotted for such objections under 25 C.F.R. § 81.22 had expired.

During the summer of 1992, BIA officials in Washington exchanged correspondence with defendant Gaiashkibos. Also, defendant Begay, who was serving as Gaiashkibos's representative, met with BIA officials to discuss the election. On October 7, 1992, defendant Matheson sent a formal reply to defendant Gaiashkibos's April 24 letter, informing Gaiashkibos that the governing board had no authority to declare the election results void. Nonetheless, after an analysis of tribal records and BIA regulations, defendant Matheson determined that the election was indeed flawed. In his opinion, elections on amendments to tribal constitutions must be conducted in the same manner as the original constitutional election, which means that the voters have to be of the same class. Because the 1966 vote was limited to Lac Courte Oreilles members living within the reservation or to non-reservation residents with at least 1/2 tribal blood, the 1992 vote was invalid because a large percentage of those members who registered for the 1992 vote did not meet those qualifications. Therefore, defendant Matheson revoked the BIA's prior approval of the 1992 results, although he ruled that the BIA was still compelled to hold an election on the two proposed amendments. He directed the local BIA office to make arrangements. At this new election, only Lac Courte Oreilles member who live within the reservation or non-residents who have at least 1/2 tribal blood would be permitted to vote.

On November 7, 1992, plaintiff Sandra Thomas sent a letter to defendant Brown appealing defendant Matheson's

decision. The BIA lost this letter and has taken no further action on Matheson's decision.

For the next three years, the local BIA office and the governing board were in contact about the new election but no election was scheduled. In July 1995, defendant Begay met with an official from the BIA solicitor's office to determine whether the tribe could pass a resolution enabling an election on different proposed amendments before a re-election on the 1992 proposed amendments. The BIA official drafted a proposed resolution captioned "Dismissal of Secretarial election Held February 1, 1992" and it was passed by the governing board.

JURISDICTIONAL FACTS

After plaintiffs informed the governing board that they had initiated this lawsuit, the board passed a resolution on May 19, 1997, declaring "to support the Plaintiffs in the lawsuit" but not "to join the lawsuit at this time." On November 24, 1997, the governing board rescinded the support of plaintiffs' lawsuit that was "indicated" by the May 19 resolution. Also, the board resolved that it "shall not voluntarily become a party" and that if it were named as a defendant, the board "shall assert Sovereign Immunity." On November 26, 1997, plaintiffs filed the amended complaint naming the governing board and its members as defendants.

OPINION

A. Introduction

A brief description of the six causes of action in the amended complaint and their status in light of the conclusions reached in October 14, 1997 opinion and order will be a useful aid to the analysis. In this description, defendant

governing board and defendants board members are referred to collectively as the joined defendants.

1. **First Cause of Action**: Plaintiffs seek declaratory and injunctive relief pursuant to 25 U.S.C. § 476(d)(2), requiring that government defendants declare the 1992 amendments valid and enforceable. Defendant governing board has been determined a necessary party to resolution of these claims because the amendments concern matters of fundamental importance to the tribe. Moreover, there is the practical concern that although government defendants could be directed to declare the amendments valid, the board is the only entity with responsibility for enforcing the amendments.

2. **Second Cause of Action**: Plaintiffs seek declaratory and injunctive relief pursuant to 5 U.S.C. § 706, setting aside the decision to revoke approval of the 1992 amendments and the ruling addressing voting in subsequent elections on tribal constitutional amendments. Defendant governing board is a necessary party to these claims because they involve matters of fundamental importance to the tribe.

3. **Third Cause of Action**: Plaintiffs name defendants Brown and Matheson in their individual capacities and seek compensatory damages for alleged violations of plaintiffs' constitutional rights. These claims have been dismissed for lack of personal jurisdiction.

4. **Fourth Cause of Action**: Plaintiffs seek compensatory damages against government defendants for breach of their trust responsibility to the tribe. Defendant governing board has been determined a necessary party to resolution of these claims. Because plaintiffs and the tribe are both beneficiaries of this trust relationship, yet have different interests, government defendants could be exposed to subsequent litigation if the governing board is not a party to this action.

5. **First Cause of Action Against Joined Defendants**: Plaintiffs seek a declaration that tribal defendants violated the

Indian Reorganization Act, compensatory damages and injunctive relief requiring them to abide by and enforce the 1992 constitutional amendments.

6. **Second Cause of Action Against Joined Defendants**: Plaintiffs seek compensatory damages pursuant to § 1985(3) for joined defendants' participation in a conspiracy to deprive plaintiffs of their civil rights.

B. Tribal Governing Board's Assertion of Sovereign Immunity

Indian tribes are sovereign entities that possess "the common-law immunity from suit traditionally enjoyed by sovereign powers." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). Tribal sovereign immunity is controlled by Congress but "'without Congressional authorization" the 'Indian Nations are exempt from suit.'" Id. (quoting United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512 (1940)). A waiver of sovereign immunity "'cannot be implied but must be unequivocally expressed'" by Congressional or tribal action. See Santa Clara Pueblo, 436 U.S. at 58-59 (quoting United States v. King, 395 U.S. 1, 4 (1969)).

Defendant governing board has asserted its immunity. Under Santa Clara Pueblo, it is entitled to immunity. There is no merit to plaintiffs' contention that Congress abrogated tribal immunity when it passed the Indian Reorganization Act. In support of their argument, plaintiffs point to 25 U.S.C. § 476(d), which provides:

> (d) Approval or disapproval by Secretary; enforcement
> (1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the

> election unless the Secretary finds that the proposed constitution, and bylaws or any amendments are contrary to applicable laws.
> (2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. *Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.*

(Emphasis added). Contrary to plaintiffs' assertion, this narrow jurisdictional grant for actions against *United States government officials* cannot be read as an unequivocal expression by Congress that *tribal* sovereign immunity has been quashed. See Santa Clara Pueblo, 436 U.S. at 58. Indeed, in an earlier brief, plaintiffs maintained that the Act's legislative history revealed that its purpose was to curb administrative absolutism by the BIA with respect to supervision of tribal constitutional elections. Cf. Coyote Valley Band of Pomo Indians v. United States, 639 F. Supp. 165, 173-74 (E.D. Cal. 1986) ("While the IRA did not contemplate a complete cessation of secretarial supervision over various aspects of Indian life, one of the major objectives of the legislation was to curb administrative absolutism."). Plaintiffs' interpretation of the legislative history supports a strict reading of § 476(d). To curb administrative absolutism, Congress established federal jurisdiction over suits against BIA officials so that tribes and members could obtain relief should these officers ignore their duty to review tribal constitutional amendments. It was not necessary for Congress to waive tribal immunity to achieve this result.

The conclusion that defendant governing board is entitled to immunity requires that the claims against it be dismissed for lack of jurisdiction. Moreover, this conclusion may require dismissal of the other claims in which defendant governing board is a necessary party.

C. Dismissal Pursuant to Rule 19 for Failure to Join an Indispensable Party

Determining whether dismissal is required pursuant to Rule 19 involves a two-step inquiry. First, the court must determine whether an absent party is "necessary." See United States ex rel. Hall v. Tribal Development Corp., 100 F.3d 476, 478 (7th Cir. 1996). Second, if the necessary party cannot be joined, the court must determine whether the party is "indispensable," requiring that the action be dismissed owing to its absence. See id. at 479.

In the October 14, 1997 opinion and order, I determined that the governing board by itself and as the political representative of the tribe was a necessary party to plaintiffs' claims against government defendants for violations of the Indian Reorganization Act and Administrative Procedure Act and the breach of the United States' trust responsibility. See Opinion and Order dated October 14, 1997, dkt. #54, at 19-21. Although neither party raised the issue of joinder with respect to plaintiffs' first cause of action against defendants board members for violations of the Indian Reorganization Act, that cause of action requires joinder of the governing board as well. Plaintiffs seek both a declaration that the Act was violated and that the 1992 amendments are valid, and injunctive relief enforcing the amendments. Without doubt, these claims concern matters of fundamental importance to the tribe and require joinder of the governing board.

Having determined that the governing board is a necessary party to all of plaintiffs' claims that are related to the validity and enforcement of 1992 amendments, the eligibility of voters in future tribal constructional elections and government defendants' alleged breach of trust responsibility to plaintiffs, I must decide whether defendant governing board is indispensable to the resolution of these

claims, requiring dismissal. Rule 19(b) lists four factors to guide the analysis:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already rendered parties; second, the extent to which, by protective provisions in the judgment by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

The parties do not shape their arguments around these guideposts. Instead, government defendants cite case law suggesting that when a tribe is a necessary party and is not present because it has asserted immunity, there is no need to consider all four factors; society's interest in preserving tribal immunity *alone* warrants dismissal. See, e.g., Fluent v. Salamanca Indian Lease Authority, 928 F.2d 542, 547-48 (2d Cir. 1991); see also 4 James Wm. Moore et al., Moore's Federal Practice § 19.05[2][c] n.39 (3d ed. 1997) (collecting authority). Plaintiffs respond by attempting to distinguish this case law on the facts.

A case by case analysis is not required. A brief review of these four factors establishes conclusively that plaintiffs' claims cannot be adjudicated "in equity and good conscience," given the absence of the governing board. See Rule 19(b). One, a judgment and injunctive relief would be prejudicial to the governing board's interests because the relief plaintiffs' request would directly affect the internal workings of the board and the political structure of the tribe it represents. Two, this prejudice cannot be avoided through a careful shaping of relief. The relief that plaintiffs want is

enforcement of the 1992 amendments; they are not subject to modification. Three, a judgment entered in absence of the governing board would not accurately reflect the various tribal interests at stake. Plaintiffs asserted previously that the governing board's May 1997 resolution to "support" them demonstrated that the board was on their side. However, the governing board has since revoked that resolution, has decided not to join this lawsuit and has chosen to assert its sovereign immunity. This is compelling evidence that plaintiffs cannot serve as a proxy for the governing board or the tribe. Moreover, the opposite cannot be assumed, that is, that government defendants represent the governing board's interests. Presented with the opportunity, the governing board choose not to intervene. Any measurement of its view of the merits would be speculative.

The first three factors point in favor of dismissal. The bearing of the fourth factor is less certain. At first glance it seems to point in favor of plaintiffs because plaintiffs do not appear to have any other remedy should these claims be dismissed. (There is no evidence that plaintiffs may prosecute these claims in a tribal court). Moreover, plaintiffs assert that dismissing these claims because of the governing board's absence eviscerates the Indian Reorganization Act which, in their view, is intended primarily to encourage the participation of tribal members in tribal government. If this suit does not proceed, plaintiffs argue, congressional intent would be frustrated.

But the fourth factor points in the other direction. Plaintiffs' argument neglects the fact that allowing litigation on these claims in the absence of the governing board would eviscerate the firmly recognized principle of tribal sovereign immunity. It is true that Congress has provided federal courts with limited jurisdiction over BIA officials for claims relating to tile Indian Reorganization Act. But Congress has not taken the additional step of waiving tribal sovereign immunity.

Permitting this suit to move forward even though tribal immunity remains intact would send the false signal that the federal courts, not tribal polling booths, are an appropriate place for different tribal political factions to settle their disputes.

In conclusion, the first three factors of Rule 19(b) favor dismissal of the claims. Although the fourth factor can be viewed to favor allowing plaintiffs to proceed, it also can be viewed to favor the preservation of tribal sovereign immunity. Accordingly, I find that the tribal governing board is an indispensable party to litigation of these claims, requiring that they be dismissed in the board's absence.

D. Compensatory Damage Claims Against Board Members

Plaintiffs assert two causes of action against defendants board members that are not affected by the absence of the governing board; because plaintiffs seek only money damages there is no concern that a judgment against defendants would affect the tribe's interests. One, plaintiffs assert that defendants violated the Indian Reorganization Act, and two, they contend that under 42 U.S.C. § 1985(3), they are entitled to money damages to remedy infringement upon what plaintiffs describe as their federal voting rights and their right to travel.

With respect to both causes of action, defendants contend that subject matter jurisdiction is lacking, that they are shielded by the tribe's sovereign immunity and that they are entitled to official immunity because their allegedly wrongful actions occurred in the performance of their duties. Alternatively, defendants contend that plaintiffs have failed to state claims pursuant to § 1985(3) because defendants' allegedly wrongful actions were authorized by statute and BIA regulations.

1. Indian Reorganization Act

The threshold question is whether the Indian Reorganization Act provides a private right of action against tribal authorities. Arguing that it does not, defendants cite Smith v. Babbitt, 875 F. Supp. 1353 (D. Minn. 1995), aff'd, 100 F.3d 556 (8th Cir. 1996). In Smith, the plaintiffs were enrolled and non-enrolled members of the Shakopee Mdewakanton Sioux who sued members of the tribal governing council alleging that the council had violated rights guaranteed by the Act. The plaintiffs complained of irregularities in membership determinations, elections and attempts to amend the tribal constitution. See id. at 1362. The district court dismissed the claims, holding that the "IRA does not contain a provision conferring federal courts with jurisdiction to hear a private cause of action against an Indian tribe or its officials for IRA 'violations.'" Id. The district court cited two decisions, Boe v. Fort Belknap Indian Community, 642 F.2d 276, 279 (9th Cir. 1981), and Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529, 531 (8th Cir. 1967), each of which held that the Indian Reorganization Act did not establish subject matter jurisdiction over such claims. In particular, the district court quoted the following statement from Twin Cities Chippewa: "The Act merely provides the authority and procedures whereby an Indian tribe may organize itself and adopt a tribal constitution and bylaws. The Act makes no mention of jurisdiction in any sense and such is not within its purview." Twin Cities Chippewa, 370 F.2d at 531 (quoted in Smith, 875 F. Supp. at 1363).

Noting that Boe and Twin Cities Chippewa predate the 1988 amendments to the Indian Reorganization Act, plaintiffs argue that this authority should be disregarded. They contend that contrary to the statement in Twin Cities Chippewa, the Act now mentions jurisdiction expressly in § 476(d)(2). This

fact does not distinguish these cases. The language of § 476(d)(2) is plain. Through section § 476(d)(2), Congress established a minor role for the federal courts to entertain suits against government officials should the BIA fail to fulfill its supervisory duties. In each of the cited cases, the relevant issue was whether subject matter jurisdiction exists over claims against *tribes and tribal officers* and that issue was squarely before the court, Boe, 642 F.2d at 277; Twin Cities Chippewa, 370 F.2d at 531-32, Smith, 875 F. Supp. at 1362-63. In each case, the court determined that jurisdiction was lacking. I find these decisions persuasive and conclude that subject matter jurisdiction is lacking in this case.

2. Section 1985(3)

Plaintiffs' § 1985(3) cause of action concerns acts of defendants undertaken after the 1992 election. Plaintiffs assert that they were deprived of their rights by defendants' post-election contacts with BIA officials questioning the validity of the elections, their refusal to recognize the amendments and their enactment of resolutions voiding the amendments. According to plaintiffs, defendants participated in a private conspiracy because not all defendants were board members when these acts occurred. Specifically, defendant Begay was not on the board in the summer of 1992 when he met with BIA officials on behalf of defendant Gaiashkibos.

Section 1985(3) does not create an independent cause of action. It is a jurisdictional statute enabling persons to recover damages in federal court for deprivations of rights guaranteed by federal or state law. See Great American Federal Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 372 (1979); Stevens v. Tillman, 855 F.2d 394, 404 (7th Cir. 1988). A person prosecuting a claim under § 1985(3) must show a violation of a substantive right enforceable in the federal courts. Plaintiffs provide only a cryptic description of

what rights are involved. They state: "[t]his case involves a *federal* election" and that "rights protected by the Voting Rights Act, 42 U.S.C. § 1971 are implicated." See Pls.' Br. in Opp. to Mot. to Dismiss, dkt. #64, at 23, 24. Also, plaintiffs explain that their right to travel has been violated because the BIA decision to reject the 1992 amendments implies that certain members who voted in the 1992 election must reside within the reservation to be eligible to vote in future elections. Plaintiffs have not articulated how this right is severable from what I view as a general assertion of a violation of their right to vote in future tribal elections. Accordingly, I construe plaintiffs' § 1985(3) cause of action to be founded on deprivations of their rights to vote in tribal constitutional elections.

However, because plaintiffs have not suffered a deprivation of a federally enforceable right, subject matter jurisdiction is lacking. Understanding why federal jurisdiction is lacking begins with the Supreme Court's decision in Santa Clara Pueblo, 436 U.S. at 49, in which the Court held that the Indian Civil Rights Act, 25 U.S.C. §§ 1301-41, is the source of rights for tribal members. It is significant that these statutory rights that protect tribal members against overreaching by tribal authority ("the position of individual tribal members vis-à-vis the tribe") are not the same as federal constitutional rights protecting people against overreaching by state and federal government. See id. at 62-63. Equally important, Santa Clara Pueblo holds that the federal courts have a limited role in enforcing rights guaranteed by Indian Civil Rights Act: the only means available to challenge alleged abuses of tribal authority is by means of a writ of habeas corpus. See id. at 66.

The dispute in Santa Clara Pueblo concerned a mother's and daughter's claim that tribal council members had violated their rights to equal protection of law guaranteed by the Indian Civil Rights Act. Under tribal law, although the mother was a

tribal member, the daughter did not have membership rights because her father was not a tribal member. The mother and daughter claimed that this tribal law violated their equal protection rights because children of male tribal members had membership rights even if their fathers were not married to tribal members. The Supreme Court held that federal court jurisdiction did not exist over the mother's and daughter's request for declaratory and injunctive relief against the tribal officers. See id. at 72.

Santa Clara Pueblo does not provide a complete answer to plaintiffs' assertion of jurisdiction because plaintiffs have named defendants in their individual capacities, asserting that defendants were involved in a private conspiracy. Nevertheless, the Tenth Circuit has applied Santa Clara Pueblo in a § 1985(3) action and has held that federal court jurisdiction is lacking over claims involving alleged deprivations of tribal rights by private individuals. See Wheeler v. Swimmer, 835 F.3d 259 (10th Cir. 1987). In Wheeler, the plaintiffs were members of the Cherokee nation who ran an unsuccessful campaign for various tribal offices. Initially, plaintiffs sought but were unable to obtain administrative relief from the BIA. Subsequently, plaintiffs brought a § 1985(3) claim (among others) against the successful candidates. The plaintiffs alleged that the successful candidates had interfered in the election process in violation of plaintiffs' rights guaranteed by the First, Fifth, Ninth, Thirteenth and Fifteenth amendments. See id. at 260-61. Relying on Santa Clara Pueblo, the court of appeals held that the Indian Civil Rights Act provided the only source of rights for the plaintiffs and that federal court jurisdiction was lacking. See id. at 262. Furthermore, the court of appeals recognized that if such jurisdiction existed, it would jeopardize the principle of allowing Indian tribes to conduct elections free from federal interference. See id.

Following the reasoning in Wheeler, I find no basis for federal court jurisdiction over over plaintiffs' § 1985(3) claims. Plaintiffs have failed to establish that federal rights are involved simply because this case arises out of an attempt to amend the tribal constitution pursuant to the Indian Reorganization Act. Congress's failure to establish jurisdiction over private causes of action under the Act demonstrates that plaintiffs cannot use this act as a source of a federal right. In addition, the conclusion reached in the October 14, 1997 opinion and order that plaintiffs had standing to pursue their claims against government defendants is not inconsistent with the conclusion that plaintiffs have no independently enforceable federal right to vote on tribal constitutional amendments. Through the Indian Reorganization Act, Congress created a "right" that allowed tribes to sue BIA officials to compel them to perform their duties under the act. Also, Congress established standing for individual tribal members to bring suits to enforce this right (provided as a practical matter that the tribe was a willing participant). However, Congress has not taken the additional step of creating an independently enforceable federal right for individual tribal members to sue individuals for interference in the tribal constitutional process. See Santa Clara Pueblo, 436 U.S. at 62.

ORDER

IT IS ORDERED that:

1. Defendant Tribal Governing Board of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians is immune from suit by plaintiffs under the doctrine of sovereign immunity;

2. Plaintiffs' claims against defendant governing board are DISMISSED because the board is immune from suit;

3. Plaintiffs' first, second and fourth causes of action against defendants Babbitt, Brown, Deer and Matheson and plaintiffs' request for injunctive relief against defendants Begay, Carley, Corbine, Diamond, Gaiashkibos, Isham and Trepania are DISMISSED, pursuant to Fed. R. Civ. P. 19(b);

5. Plaintiffs' first and second causes of action against defendants Begay, Carley, Corbine, Diamond, Gaiashkibos, Isham and Trepania are DISMISSED for lack of jurisdiction;

6. The clerk of court is directed to enter final judgment in favor of defendants and close the file.

Entered this 27th of March, 1998.

BY THE COURT:

s/
BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

SANDRA THOMAS, TINA THOMAS,
MICHAEL NALEWAJA, and
ROBERT E. SANDER,

OPINION AND
ORDER

Plaintiffs,

v. 96-C-828-C

UNITED STATES; UNITED STATES
DEPARTMENT OF INTERIOR, BUREAU
OF INDIAN AFFAIRS; BRUCE BABBITT,
Secretary of the Interior, in his official capacity,
ADA E. DEER, Assistant Secretary of the Interior
for Indian Affairs, in her official capacity;
DR. EDDIE F. BROWN, Former Assistant
Secretary of the Interior for Indian Affairs,
individually and in his official capacity; and
DAVID J. MATHESON, Former Deputy
Commissioner of the Bureau of Indian Affairs,
individually and in his official capacity;

Defendants.

Plaintiffs are members or ancillary members of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians who favor two proposed amendments to the tribal constitution, one of which would redefine the requirements for tribal membership. The tribe voted to approve the amendments in 1992. Although 25 U.S.C. § 476(d) appears to give the

Secretary of the Interior a deadline of 45 days in which to approve or disapprove tribal constitutional amendments, the acting assistant director of the Department of the Interior revoked approval of the 1992 election more than eight months after It had taken place, when some members of the tribe had raised objections to the results. After various efforts to persuade defendants and the tribal governing board to accept the results of the election or to hold a new election, plaintiffs filed this lawsuit seeking injunctive and declaratory relief reinstating the election results, compensatory damages and attorney fees.

The parties have filed cross motions for summary judgment. However, defendants have raised a variety of jurisdictional and procedural objections pursuant to Fed. R. Civ. P. 12(b)(1), (2) and (7) that must be decided before the merits of the motions for summary judgment can be addressed. Defendants contend that subject matter jurisdiction is lacking, but I conclude that it exists under the general federal question statute, 28 U.S.C. § 1331; the Indian Reorganization Act, 25 U.S.C. § 476(d)(2); and the Administrative Procedure Act, 5 U.S.C. § 702. Defendants contend that the court lacks personal jurisdiction over the federal officials; I conclude that there is jurisdiction under 28 U.S.C. § 1391(e) with respect to plaintiffs' claims for injunctive and declaratory relief against the federal officials who are named in their official capacities, but not with respect to plaintiffs' claims for compensatory damages against the federal officials that are named in their individual capacities. Finally, I conclude that although plaintiffs have standing to assert their remaining claims, the tribal governing board is a necessary party. Because it is possible that the board will be joined in this lawsuit, I will stay the proceedings briefly, pursuant to Fed. R. Civ. P. 19(a). Before turning to the facts and issues presented, I will describe briefly the law

concerning the process for amending tribal constitutions under the Indian Reorganization Act.

BACKGROUND

The Indian Reorganization Act traces its origins to President Franklin Roosevelt's New Deal. See Timothy W. Joranko and Mark C. Van Norman, Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments, 29 Gonz. L. Rev. 81, 83 (1993-94). The Act offered tribes the opportunity to become self-governing, a process that starts when a tribe adopts a constitution. See id. at 90-91. Although many tribes have organized under the Act, some tribes have not; for example, the Navajo have not organized under the Act. See Judith Resnik, Dependent Sovereigns: Indian Tribes, States and the Federal Courts, 56 U. Chi. L. Rev. 671, 704 (1989).

Once a tribe has adopted a constitution, the Act and the rules promulgated under it by the Secretary establish the following basic procedure for making amendments. The process begins when an amendment proposal is submitted to the Secretary. The proposal may be initiated by a tribe's governing body, see 25 C.F.R. § 81.5(a), or (as in this case) directly by a tribe's membership via a petition. See id. § 81.5(b). The Secretary reviews the technical accuracy of the proposal (for example, the correct number of signatures) and upon approval an election is called. See id. § 82.10. The registration process begins by notifying the membership, compiling a voter list and completing other ministerial duties. See generally id. §§ 81.12-.14. Then the election is held and the results are submitted to the secretary for final approval. See 25 U.S.C. § 476(a) and (d). The BIA and its officials have been delegated the responsibility for actually performing the administrative tasks. See 25 C.F.R. §§ 81.1(c) and 81.24.

The following undisputed facts concerning the attempted amendment of the Lac Count Oreilles constitution are taken from the Joint Proposed Stipulated Facts and each side's proposed additional facts.

FACTS

A. The Tribe's Organization and Membership

The Lac Courte Oreilles Band of Lake Superior Chippewa Indians adopted the Lac Courte Oreilles Constitution under the Indian Reorganization Act in 1966. Several amendments have been made to the tribal constitution since its adoption, but as of 1992 it provided that Lac Courte Oreilles membership would consist of the following classes of individuals: (1) all persons of Lac Courte Oreilles blood who were listed on the tribe's 1940 census roll or were eligible to be included on that roll; (2) any lineal descendent of an Lac Courte Oreilles member born prior to 1966; and (3) persons who had at least 1/4 Lac Courte Oreilles blood and applied for membership under tribal ordinance. As of February 1992, the Lac Courte Oreilles tribe had 4,378 members of whom 3,659 were eligible to vote. Also, 1,127 persons were listed on the tribe's ancillary roll, which is a list of the children of Lac Courte Oreilles members who do not meet membership requirements.

B. The Parties

Plaintiff Sandra Thomas is an Lac Courte Oreilles member who lives within the Lac Courte Oreilles reservation. She has at least 9/32 Lac Courte Oreilles blood. Plaintiff Tina Thomas is the daughter of plaintiff Sandra Thomas. She lives within the reservation and is listed on the ancillary roll; she has at least 9/64 Lac Courte Oreilles blood. Plaintiff Robert

E. Sander is an Lac Courte Oreilles member. He has at least 3/8 Lac Courte Oreilles blood and lives outside the reservation. Plaintiff Michael Nalewaja is an Lac Courte Oreilles member who has 1/4 Lac Courte Oreilles blood and lives outside the reservation. All plaintiffs reside in the Western District of Wisconsin.

Defendants Department of Interior and Bureau of Indian Affairs are executive agencies of the United States and have authority to oversee relations between the United States and the various Indian tribes, Defendant Bruce Babbitt is Secretary of the Department of the Interior. He is named in his official capacity. Defendant Ada E. Deer is the Assistant Secretary of the Interior for Indian Affairs and is named in her official capacity. Defendant Dr. Eddie F. Brown was the Assistant Secretary of the Interior for Indian Affairs in 1992 and is named in his official and individual capacities. Defendant David Matheson was Deputy Commissioner of the BIA in 1992 and is named in his official and individual capacities.

C. The Proposed Amendments

In the late 1980s, some Lac Courte Oreilles members began to consider amending the tribal constitution to change the structure of tribal government and the standards for tribal membership. In 1988, a committee was formed to explore the issue and plaintiff Sandra Thomas was named as the chairperson. Roughly three years of meetings and discussion resulted in four petitions for amendments that were circulated among the membership and sent to the local BIA office for approval. Plaintiff Sandra Thomas sponsored the petitions and served as the "Spokesman for the petitioners," pursuant to 25 C.F.R. § 82.1(o).

On November 5, 1991, the local BIA office approved two of the petitions and authorized an election. Proposed

amendment A eliminated the 1/4 Lac Courte Oreilles blood membership requirement and enabled any descendant of a Lac Courte Oreilles member to gain membership. Proposed amendment B extended the length of the terms of the tribal governing board members to four years.

D. The Election

The local BIA office set the election for February 1, 1992. Prior to that date, registration packets were sent to the 3,659 voting-eligible Lac Courte Oreilles members, advising them of the election and informing them of the need to register. Responses were received from 1,130 Lac Courte Oreilles members who were registered. The election results were as follows: of the total 1,130 registrants, 650 cast votes. Amendment A passed by a margin of 542 to 105 and amendment B passed by a vote of 373 to 274.

E. The Post-Election Proceedings

After the election, Gaiashkibos, who was then the Chairman of the tribal governing board, questioned the results. On February 3, 1992, he sent a letter to the local BIA office regarding whether a provision within the tribal constitution had been satisfied; this provision required that all amendments be approved by at least 30% of the eligible voters. On February 5, 1992, another Lac Courte Oreilles member sent a letter to the local BIA office challenging further some of the registration procedures. The local BIA office rejected both complaints and approved the amendments. On February 10, 1992, the office sent written notice to plaintiff Sandra Thomas, as spokesman for the petitioners, and to Gaiashkibos.

Nonetheless, controversy continued over the election. Although some copies of the Lac Courte Oreilles constitution

were printed to include the new amendments, when plaintiff Sandra Thomas contacted the tribal governing board to learn how ancillary members would obtain full membership, which was available to them under the amended constitution, she could not get an answer. On April 18, the tribal governing board passed a resolution to "not recognize" the two new amendments. In addition, on April 16 and 24, 1992, Gaiashkibos sent letters to defendant Brown, seeking review of the decision to affirm the election results. Gaiashkibos argued that the election had not been conducted pursuant to certain provisions of the tribal constitution and that not all of the voting eligible members had been informed of the vote because of a clerical error made by the local BIA office.

On April 23 and 24, 1992, plaintiff Sandra Thomas also wrote to defendant Brown. In her first letter, she notified defendant Brown about the tribal governing board's disapproval of the amendments. In the second letter, she responded directly to Gaiashkibos's concerns and complained to defendant Brown that the three-day time period allotted for such objections under 25 C.F.R. § 81.22 had expired.

During the summer of 1992, BIA officials in Washington exchanged correspondence with Gaiashkibos and met with Gaiashkibos's representatives to discuss the election. On October 7, 1992, defendant Matheson sent a formal reply to Gaiashkibos's April 24 letter. Defendant Matheson informed Gaiashkibos that the governing board had no authority to declare the election results void, but that an analysis of tribal records and BIA regulations revealed that the election was indeed flawed and therefore Matheson was revoking the prior approval of the results. Defendant Matheson explained that elections on amendments to tribal constitutions had to be conducted in the same manner as the election on the original constitution, meant that the voters had to be of the same class. Defendant Matheson determined that the original 1966 vote was limited to members living on the Lac Courte Oreilles

reservation or to non-reservation residents with at least 1/2 Lac Courte Oreilles blood, and that the 1992 vote was invalid because a large percentage of those members who registered did not meet these qualifications. Although Matheson revoked approval of the 1992 results, he explained that the BIA was still compelled to hold an election on the two proposed amendments and directed the local BIA office to make such arrangements. At this new election, however, the only Lac Courte Oreilles members permitted to vote would be those members who lived within the reservation or non-residents who had at least 1/2 Lac Courte Oreilles blood.

On November 7, 1992, Plaintiff Sandra Thomas sent another letter to defendant Brown appealing defendant Matheson's decision. The BIA lost this letter and has taken no further action on Matheson's decision.

For the next three years, the local BIA office and the tribal governing board were in contact about the new election but none was scheduled. In July 1995, a representative of Gaiashkibos met with an official from the BIA solicitor's office to determine whether the tribe could pass a resolution enabling an election on different proposed amendments before a re-election on the 1992 proposed amendments. The BIA official drafted a proposed resolution captioned "Dismissal of Secretarial election Held February 1, 1992" and it was passed by the tribal governing board.

In the spring of 1996, the tribal governing board revisited the issue of the 1992 election. On May 16, 1996, a member wrote to the BIA seeking a review of defendant Matheson's decision to revoke the 1992 amendments. The BIA has not responded to this letter. After plaintiffs informed the governing board that they had initiated this lawsuit, the board passed a resolution on May 19, 1997, declaring "to support the Plaintiffs in the lawsuit" but not "to join the lawsuit at this time."

F. Plaintiffs' Damages

Plaintiffs Sandra Thomas, Sander and Nalewaja are affected adversely by the BIA's decision because under defendant Matheson's ruling, they must reside on the reservation to vote in future constitutional elections as they have less than 1/2 Lac Courte Oreilles blood. Plaintiff Tina Thomas is affected adversely by the decision because under she cannot obtain full Lac Courte Oreilles membership, as she would have under the 1992 tribal membership amendment.

DISCUSSION

A. The Parties' Claims and Motions

Plaintiffs have moved for summary judgment on the following three classes of claims. They have brought Bivens claims against defendants Brown and Matheson, contending that Brown and Matheson intentionally violated rights guaranteed plaintiffs under the Fifth, Ninth, Fifteenth and Twenty-Sixth Amendments to the United States Constitution. They seek compensatory damages. Also, plaintiffs contend that the administrative decision to revoke approval of the 1992 election results has no legal basis and was made arbitrarily and capriciously, and they seek reinstatement of the original administrative decision to approve the results. Finally, plaintiffs contend that defendants violated their trust responsibility to the Lac Courte Oreilles tribe and seek compensatory damages.

Defendants have moved to dismiss this action on various procedural grounds or in the alternative for summary judgment. On the procedural front, defendants contend that this court lacks subject matter jurisdiction, that this court has no personal jurisdiction over defendants Brown and Matheson with respect to plaintiffs' Bivens claims, that plaintiffs lack

standing and that this action should be dismissed because the Lac Courte Oreilles tribe is an indispensable party. On the merits defendants Brown and Matheson argue that plaintiffs have failed as a matter of law to state a Bivens claim, or alternatively, that they are protected by the doctrine of qualified immunity. With respect to the administrative decision to reject the 1992 election results, defendants argue collectively that the decision was correct as a matter of law, and that because the decision was correct, plaintiffs' breach of trust claim fails.

B. Subject Matter Jurisdiction

Defendants characterize this action as essentially involving an "intra-tribal dispute" and argue that this court has no jurisdiction over such matters. In support, defendants cite Potts v. Bruce, 533 F.2d 527 (10th Cir. 1976), among other cases, and argue that these cases establish a general rule that federal courts have no authority to settle intra-tribal political disputes. Moreover, defendants contend that plaintiffs have not exhausted tribal remedies and argue that this is a further reason why subject matter jurisdiction does not exist.

Although plaintiffs object to defendants' characterization of this action and attempt to distinguish the case law on various factual grounds, a detailed analysis of the cited precedent is not necessary. Plaintiffs are challenging the actions of federal officials conducting a "Secretarial election" pursuant to the Indian Reorganization Act, 25 U.S.C. 476. See 25 C.F.R. § 81.2 ("*Secretarial election* means an election held pursuant to regulations prescribed by the Secretary as authorized by Federal Statute (as distinguished from *tribal* elections which are conducted under tribal authority)"). There are several grounds for subject matter jurisdiction. It exists under 25 U.S.C. § 476(d)(2), which specifically provides that

"[a]ctions to enforce the provisions of this section may be brought in the appropriate Federal District court." Second, because this case involves a challenge to an administrative decision made by federal officials, subject matter jurisdiction exists under the Administrative Procedure Act, 5 U.S.C. § 702. As to the Bivens claims against defendants Brown and Matheson, subject matter jurisdiction exists pursuant to the general federal question statute, 28 U.S.C. § 1331. See Schweiker v. Chilicky, 487 U.S. 412, 421 (1988). Moreover, because this case concerns a Secretarial election and not a tribal election, see 25 C.F.R. § 81.2, it is irrelevant whether plaintiffs exhausted possible tribal remedies. Defendants' motion to dismiss this action for lack of subject matter jurisdiction will be denied.

C. Personal Jurisdiction

Defendants Brown and Matheson argue that the Bivens claims should be dismissed because this court does not have personal jurisdiction over them as individuals. They allege that they do not reside in this judicial district and have not had any significant contacts with this state.

The burden of establishing that jurisdiction exists rests on plaintiffs because they are the parties asserting jurisdiction. See Nelson v. Park Industries, Inc., 717 F.2d 1120, 1123 (7th Cir. 1983). Plaintiffs must make a prima facie showing that personal jurisdiction exists. See id.

Plaintiffs support their argument that personal jurisdiction exists over defendants Brown and Matheson with the factual assertion that a substantial number of the events giving rise to their claim occurred in this district because this is where the 1992 election was held. Also, plaintiffs cite 28 U.S.C. § 1391. Although this statute is the general venue statute, subsection (e) provides a federal court with jurisdiction over federal officials for "mandamus-type suits"

in which the officials are named as defendants in their official capacities, provided that the cause of action arose in the district. See Stafford v. Briggs, 444 U.S. 527, 543-44 (1980); see also 17 James Wm. Moore et al., Moore's Federal Practice § 110.31[6] (3d ed. 1997). The conferral of this jurisdiction is justified by the fact that "no personal cost or inconvenience is incurred" by officials who are named as defendants in such suits. The burden of defending these suits falls on the federal government, not the named officials. See Stafford, 444 U.S. at 544. The net result is that under § 1391 (e), this court has personal jurisdiction over the defendant federal officials that are named in their official capacities.

However, subsection (e) does not establish comparable jurisdiction over federal officials in suits in which they are named as defendants in their individual capacities. See Stafford, 444 U.S. at 544; see also Kreines v. United States, 33 F.3d 1105, 1108 (9th Cir. 1994) ("The Court in Stafford held that Bivens actions, which are individual capacity actions, are not within the scope of § 1391(e)'s language") (citing Stafford, 444 U.S. at 54245); 17 Moore's Federal Practice § 110.31[6]; cf. Sassower v. American Bar Ass'n, 33 F.3d 733, 735 (7th Cir. 1994)("[The fact that some of the defendants are federal employees does not subject them to damages litigation throughout the United States") (citing Stafford). Plaintiffs' Bivens claims against defendants Brown and Matheson are the type of claims for which § 1391(e) does not establish personal jurisdiction. Because plaintiffs have not provided any additional factual support for their claim that personal jurisdiction exists, such as showing how these defendants had substantial contact with Wisconsin during the performance of their duties, defendants' motion to dismiss the Bivens claims against defendants Brown and Matheson for lack of personal jurisdiction will be granted.

C. Standing

Defendants contend that plaintiffs lack standing to challenge the BIA's decision to reject the election results. They argue that the 1992 election concerned matters significant to the tribe, namely the definition of membership and the length of terms of governing board members, and that plaintiffs do not accurately represent the tribal membership as a whole.

Resolving the issue whether plaintiffs have standing involves a two-phase inquiry into constitutional and prudential limitations on the exercise of federal court jurisdiction. See Family & Children's Ctr. v. School City of Mishawaka, 13 F.3d 1052, 1058 (7th Cir. 1994). The constitutional limitation stems from Article III's requirement that federal courts limit jurisdiction to cases or controversies, a limitation that is met when a plaintiff has an injury-in-fact. See Shanahan v. City of Chicago, 82 F.3d 776, 780 (7th Cir. 1996). The prudential limitations are self-imposed restraints on judicial power that are intended to bar cases in which "no individual rights would be vindicated" and to ensure that the litigants are those individuals "best suited to assert a particular claim." See Family & Children's Ctr., 13 F.3d at 1059 (quoting Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979)). Because these prudential limitations are judicially created, however, they may be removed by Congress. See Family & Children's Ctr. 13 F.3d at 1059. What is notable for the purpose of this case is that Congress has frequently applied this power in statutes relating to civil rights. See id. at 1060.

Defendants have not categorized their concerns. Nonetheless, their allegation that plaintiffs do not represent the tribe adequately makes it apparent that defendants are contending that there are prudential limitations on plaintiffs' standing. This is the best of the two possible arguments

because plaintiffs' allegation that their federally protected tribal voting rights were impaired meets the injury-in-fact requirement imposed by Article III. See Cousins v. City Council of Chicago, 466 F.2d 830, 845 (7th Cir. 1972) (minority groups who alleged that their voting strength was diluted by redistricting had constitutional standing to challenge redistricting).

Plaintiffs' claim that they have standing rests heavily on the fact that plaintiff Sandra Thomas served as the "spokesman" for the signers of the petitions that were sent to the BIA. Under 25 C.F.R. § 82.1(o), the spokesman is defined as the person "designated by the initiators of a petition to speak on their behalf." The remainder of the plaintiffs rely on the injury caused by defendants' decision to reject the 1992 election results and defendants' determination that future voters who do not live in the reservation must have at least 1/2 Lac Courte Oreilles blood.

This case differs from most other disputes arising under the Indian Reorganization Act; usually the tribe brings the claim. See for example, Cheyenne River Sioux Tribe v. Andrus, 566 F.2d 1085 (8th Cir. 1977), in which the tribe asserted that BIA officials had applied the Twenty-Sixth Amendment incorrectly when setting voter eligibility in a Secretarial election. But in at least one case, Feezor v. Babbitt, 953 F. Supp 1 (D.D.C. 1996), individual members of a tribe who challenged the actions of BIA officials taken pursuant to the Act were found to have standing.

In Feezor, the members alleged that the BIA officials had improperly interpreted the tribal constitution and had improperly approved a proposed tribal ordinance (that tribe's constitution made certain tribal ordinances, as well as constitutional amendments, subject to BIA approval). Initially, the members sought an administrative appeal, but the BIA found that the members did not have standing and dismissed their claim. See Id. at 2-3. On appeal, the district

court reversed the BIA's decision on standing and remanded the matter for further administrative review.

The district court began its analysis of the standing question by noting that the challenged ordinance affected the members' voting rights and thus the injury-in-fact requirements imposed by Article III were satisfied. See Feezor, 953 F. Supp. at 4. Turning to the prudential limitations, the court found that the Indian Reorganization Act was intended to "encourage Indians to revitalize their self government" and that the Act was intended to protect the political interests of individual tribal members. See id. at 5. On the basis of these findings about the purpose of the Act, the court reasoned that the members had standing to challenge the BIA's decision (and enforce the rights guaranteed them under the Act) even though they were acting independently of the tribe's governing body. See id. The district court's reasoning in Feezor is persuasive. I find that plaintiffs have standing to challenge defendants' decision to reject the 1992 election results.

D. Failure to Join an Indispensable Party

With the granting of defendants Brown and Matheson's motion to dismiss the Bivens claims and the rejection of defendants' other procedural objections, what remains are plaintiffs' administrative challenge; plaintiffs' claim that the BIA violated its trust responsibility to the Lac Courte Oreilles tribe; and defendants' last procedural objection, that the Lac Courte Oreilles tribe is an indispensable party to plaintiffs' remaining claims under Rule 19. Before turning to the Rule 19 analysis, it is necessary to settle a discrepancy in terminology. The parties use different terms in arguing the necessity of having the Lac Courte Oreilles tribe become a party in this action. Defendants use the term "the band" and plaintiffs use the term "the governing board." Although

neither party has produced evidence describing the Lac Courte Oreilles tribe's political structure, I surmise that the tribal governing board is the tribe's central authority. Moreover, because the members of the governing board would be directly affected by one 1992 amendment (the length of their terms could change), and because the governing board would be responsible for enforcing the tribal membership amendment, I find that the Rule 19 issue in this case involves whether the tribal governing board (and possibly its members in their official capacities) should be a party to this lawsuit. I will use the term "the governing board" in the analysis.

The Rule 19 analysis has two steps. The court is to begin by determining whether the party is necessary to the lawsuit. See United States ex rel. Hall v. Tribal Dev. Corp., 100 F.3d 476, 478 (7th Cir. 1996). The rule provides that a party is necessary if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

See Rule 19(a). The fact that the governing board is not a party in this action presents some problems. The proposed amendments deal with matters of fundamental importance to the tribe. Moreover, should the BIA decision be reversed on the grounds advanced by the plaintiff tribal members, the BIA could be exposed to additional litigation if the governing board were to later bring suit against the BIA to re-instate its

decision for different reasons. See 4 Moore's Federal Practice § 19.03[4][d] (noting how Rule 19 protects "a party against inconsistent court orders such that compliance with one might breach another"). Finally, although the dispute in this case involves an administrative decision made by federal officials pursuant to the Indian Reorganization Act, the governing board is not a disinterested bystander. It played a part in this story; indeed, plaintiffs' problems with the 1992 election began when plaintiff Sandra Thomas tried to have the governing board adhere to the membership-related amendment. Hence, even if the BIA decision is reversed and the 1992 results are reinstated, the governing board may frustrate efforts to enforce the amendments. These concerns all support a finding that the governing board is a necessary party.

However, plaintiffs propose as a fact that the governing board "has chosen to support Plaintiffs." Plaintiffs argue that since the board is "aligned" with them, there is no need to have the board become a formal party. According to plaintiffs, the fact that the governing board supports their cause means that the board's interests will be protected by plaintiffs, the BIA will not be subjected to an inconsistent claim in the future, and the governing board will not frustrate plaintiffs' effort to enforce the ruling in this case should plaintiffs succeed. In sum, plaintiffs contend that "[c]omplete relief can be granted to the Plaintiffs by the withdrawal or reversal of the Matheson decision."

Plaintiffs' analysis is not compelling. First, the record does not support their proposed fact. It is true that the governing board passed a resolution stating that it supported plaintiffs, but that is not enough to support a factual conclusion that the board's Interests are aligned with plaintiffs'. Previously, the board has frustrated plaintiffs when they sought to enforce the 1992 amendments. It has passed a resolution not to recognize the 1992 amendments

and another resolution barring a new vote on the 1992 amendments. Even assuming the board now supports plaintiffs completely, its support is not guaranteed to last. If the governing board is not a party and its position on the merits of this suit should change once more, the board's newest position would not be represented by plaintiffs. Under Rule 19(a), the governing board is a necessary party in this action.

Defendants add to their argument that the governing board is a *necessary* party under Rule 19(a), that the board is also an *indispensable* party under Rule 19(b), and contend that the suit must be dismissed because the board is entitled to sovereign immunity. See Fed. R. Civ. P. 12(b)(7). I will presume that these immunity concerns extend beyond the governing board to the board members in their official capacities as well. See, e.g., Davids v. Coyhis, 869 F. Supp. 1401, 1409-12 (E.D. Wis. 1994)(analyzing whether a tribe's sovereign immunity extended to tribal officers and whether tribal officers were subject to claims for injunctive relief). For simplicity, however, I will continue to refer to "the governing board."

Although the governing board could assert its sovereign immunity, defendants' argument concerning Rule 19(b) presumes too much. The governing board may voluntarily join this suit as a plaintiff, making the issue of its sovereign immunity irrelevant. Moreover, if the board is joined as a defendant, it may choose to waive its sovereign immunity. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (explaining that tribal sovereign may be waived); see also Rupp v. Omaha Indian Tribe, 45 F.3d 1241, 1244-46 (8th Cir. 1995) (describing situations in which a tribe waives immunity by initiating a claim in federal court). Until these facts are known, a Rule 19(b) analysis is premature. Indeed, Rule 19(a) contemplates that once a non-joined party is determined to be a necessary party, the proceedings will be stayed so that

the party may be joined. See 4 Moore's Federal Practice § 19.04[4][a]. In addition, I observe that plaintiffs have requested a stay in the proceedings in the event that the governing board is found to be a necessary party. Plaintiffs want time to present this finding to the board and to allow it to decide whether to join the lawsuit on plaintiffs' behalf. If the board does not want to intervene as a plaintiff, the stay will provide plaintiffs the opportunity, if they choose, to amend their complaint to include the governing board as a defendant. Accordingly, I will stay these proceedings until November 28, 1997. If the governing board is not a party to this lawsuit by that date, I will examine whether the board is an indispensable party under Rule 19(b) and if so, whether this action must be dismissed pursuant to Rule 12(b)(7).

ORDER

IT IS ORDERED that

1. The motion of defendants United States, United States Department of the Interior, Bureau of Indian Affairs, Bruce Babbitt, Ada E. Deer, Dr. Eddie F. Brown and Bruce Matheson to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) is DENIED;

2. The motion of defendants Brown and Matheson to dismiss plaintiffs' Bivens claims for lack of personal jurisdiction is GRANTED;

3. The motion of defendants to dismiss for plaintiffs' lack of standing is DENIED;

4. The Lac Courte Oreilles governing body is a necessary party to this action under Rule 19(a); and

5. The motion of defendants to dismiss for failure to join an indispensable party pursuant to Fed. R. Civ. P. 12(b)(7) is DENIED at this time. The proceedings will be

stayed until November 28, 1997, at which time defendants' motion will be reconsidered.

Entered this 14th day of October, 1997.

BY THE COURT:

s/
BARBARA B. CRAM
District Judge

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

Decided December 13, 1999

Before

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

SANDRA THOMAS, *et al.*, *Plaintiffs-Appellees*,	] Appeal from the United States District Court for the Western District of Wisconsin,
No. 98-2329 *v.*	]
	] No. 96-C-828-C
UNITED STATES OF AMERICA, *et al.*, *Defendants-Appellants*.	]
	] **Barbara B. Crabb,** *Judge*.

ORDER

On consideration of the petition for rehearing and rehearing en banc filed by counsel for the defendants-appellants on October 22, 1999, all members of the original panel have voted to **DENY** rehearing, and no active member of the court has requested a vote on rehearing en banc. The petition for rehearing is therefore **DENIED.**

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

Honorable Gaiashkibos
Chairman, Lac Courte Oreilles
Tribal Governing Board
Route 2, Box 2700
Hayward, Wisconsin 54843

Dear Chairman Gaiashkibos:

This is in further response to your letter of April 24, 1992, requesting that the secretarial election held on the Lac Courte Oreilles Reservation on February 1, 1992, to amend the Constitution and Bylaws of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin be overturned. At that time you indicated that you had declared the election null and void. Subsequently on May 5, 1992, you provided us with a copy of a petition by the "People of Lac Courte Oreilles demanding that the Lac Courte Oreilles Tribal Governing Board not recognize the Secretarial election."

On June 30, 1992, we advised you that we had experienced delays in obtaining all the appropriate records relevant to this matter. We have now had an opportunity to complete our review of the records and events surrounding the election and make the following findings.

The Constitution and Bylaws of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin was adopted by the qualified voters of the Band on September 3, 1966, and approved by the Assistant Secretary of the Interior on November 2, 1966. Article IX of the Constitution provides

that it may be amended "upon request of the Lac Courte Oreilles Governing Board or upon petition of at least 75 qualified voters of the Band" and if approved shall be effective from the date of Secretarial approval.

On September 17, 1991, four petitions containing 207, 100, 82 and 97 signatures respectively were officially filed with the Great Lakes Agency Superintendent (Superintendent) requesting a Secretarial election. By letter dated September 20, 1992, the Superintendent wrote to Sandy Thomas, Tribal Member/Spokesperson for the Petition acknowledging receipt of the petitions. A copy of that letter was provided to you as Chairman. Because there was some question about the viability of some of the petitions due to their age, the petitions dating back to 1989, the Field Solicitor, Twin Cities, held that two of the petitions were stale and may no longer reflect the will of the tribe or its members. The Minneapolis Area Director (Area Director) subsequently determined that the amendments proposed in the 1989 petitions (petitions 1 and 2) were not timely submitted. Petition No. 3, which contained 82 signatures, proposed to amend Section 4 of Article IV by increasing the length of the term of office for tribal officials. Petition No. 4, which contained 97 signatures, proposed to amend Section 2 of Article II by eliminating the blood quantum requirement for membership in favor of descendancy.

On November 5, 1991, the Area Director authorized the Superintendent to conduct the election on the two proposed amendments. By letter dated November 12, 1991, the superintendent notified you, as Chairman, of the election and of the need for the Band to identify tribal representatives to serve on the Secretarial election board. On November 18, 1991, the Superintendent requested from the Band and was provided an alphabetical list of the Band's eligible voters for

use in notifying tribal members of the election and of the need to register to vote in the election. The Superintendent was notified by letter dated November 26, 1991, that the Band had appointed Mr. Dawn Kagigebi (the Band's current election committee chairman) and Ms. Delores Meraz (Band enrollment clerk) to serve on the Secretarial election board and had established January 4, 1992, as election day. The Superintendent advised the Band on November 27, 1991, that the January 4 date did not allow sufficient time for the Bureau of Indian Affairs (BIA) to comply with the requirements of the Secretary of the Interior's (Secretary) election regulations found at 25 CFR 81 and suggested the election be held February 1, 1992. On December 4, 1991, the superintendent wrote you advising that the election would be held February 1, 1992.

Election packets notifying Band members of the scheduled election and of the need to register if they desired to vote in the election were mailed out to 3,659 members. Of that number, 1,130 registered to vote in the election. On election day a total of 650 registered voters actually voted in the election, 176 voted at the polls while 474 voted by absentee ballot. Proposed Amendment A, which eliminated the blood quantum requirement in favor of descendancy, was adopted by a vote of 542 for and 105 against; Proposed Amendment B, which increased the term of office, was adopted by a vote of 373 for and 274 against. On February 10, 1992, the Acting Area Director under delegated authority approved the amendments.

You indicate that you have declared the election null and void because "only 12% of the total eligible voters living on the Reservation voted in the election"; that the membership was not adequately informed of the crucial issues being voted upon through educational meetings; and that many members

were not notified of the election because the BIA mail-out used the wrong zip code. You further contend that the BIA allowed absentee voting in violation of the Band's constitution.

In 1966 the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin organized and adopted a constitution pursuant to the Indian Reorganization Act (IRA), of June 18, 1934, (48 Stat. 984). Section 16 of the Act then provided:

> Section 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws. (Emphasis added).

On December 13, 1934, the Solicitor advised the Secretary that Section 16 contemplated two distinct and alternative types of tribal organization. They were explained and defined by the Solicitor as follows:

> In the first place, it authorizes the members of a tribe (or of a group of tribes located upon the same reservation) to organize as a tribe without regard to any requirements of residence. In the second place, this section authorizes the residents of a single reservation (who may be considered a tribe for purposes of this act, under section 19) to organize without regard to past tribal affiliation.
>
> Solicitor's opinion, M-27810 (December 13, 1934), 1 OP. Sol. on Indian Affairs 484, 487 (U.S.D.I 1979).

The Solicitor explained further that when Indians organized under Section 16 as members of a tribe or tribes their constitution and bylaws must be ratified by a majority vote of the adult members, whether residents or nonresidents of the reservation. On the other hand, if the Indians were organized as residents of a single reservation, ratification of their constitution and bylaws could be accomplished only by a majority vote of the adult Indians residing on such reservation.

The Solicitor's views were embodied in Amended Rules and Regulations for the Holding of Elections under the Indian Reorganization Act of June 18, 1934, promulgated by the Commissioner of Indian Affairs on October 18, 1935. See 55 I.D. 355. The Department of the Interior's (Department) interpretation of Section 16 as providing for two types of tribal organization with different voting rights for nonresidents is currently codified in Title 25 of the Code of Federal Regulations, Part 81.

Perhaps the most important consequence of the distinction between a group which is organized as a tribe or tribes of the

reservation and a group which is organized as a community of adult Indians is its effect on voting which is overlooked or not fully appreciated by Indian groups. The Department's early interpretations and regulations and practices over the more than 50 years since the passage of the IRA are significant because Section 16 requires that:

> [a]mendments to the constitution and bylaws may be ratified and approved by the secretary in the same manner as the original constitution and bylaws.

On June 15, 1935, the IRA was amended to read as follows:

> That in an election heretofore or hereafter held under the Act of June 18, 1934 (48 Stat. 984), on the question of excluding a reservation from the application of the said Act or on the question of adopting a constitution and bylaws or amendments thereto or on the question of ratifying a charter, the vote of a majority of those actually voting shall be necessary and sufficient to effectuate such exclusion, adoption, or ratification, as the case may be: Provided, however, That in each instance the total vote cast shall not be less than 30 per centum of those entitled to vote.

The 1935 IRA amendment was necessary when it became evident that a simple majority vote was not obtainable in most instances thereby thwarting the will of the people to adopt a constitution. In any event, the statutory requirements were incorporated into the Secretary's election regulations. The regulations make it clear that in order to be entitled to vote you must register to do so. Thus, the 30 percent participation requirement is based on the number of registered voters, not 30 percent of the tribe's eligible voters. See 25 CFR 81.1(o)

and 81.6. While it is unfortunate that only 12 percent of the eligible voters living on the reservation participated in the election, it is not violative of the statutory and regulatory requirements so long as at least 30 percent of the eligible voters who have registered vote. Voter apathy is an unfortunate occurrence in today's society.

You contend that insufficient voter education was provided by the BIA to adequately inform tribal members of the issues being voted upon. While you can never have too much information, we find that the proposed amendments to increase the term of office of tribal officials from 2 to 4 years and to eliminate the blood quantum requirement in favor of descendancy are self-explanatory. We also find that the Band has amended Section 2 of Article II - Membership on several other occasions so it would appear that membership eligibility is of ongoing interest to Band members.

Regarding your allegation that many members were not notified of the election because the BIA mail-out used the wrong zip code, we find that the stamped return envelope provided in the mail-out election packets did contain the wrong zip code. The zip code should have read 54843 rather than 54853. The zip code 54853 was for the city of Luck, Wisconsin. However, when Agency staff became aware of the mistake, the Postmaster at Luck was contacted and he advised that the Post Office was forwarding and would continue to forward all envelopes to the Hayward post office. In view of the one-day delay in forwarding mail from Luck to Hayward, Wisconsin, arrangements were made to pick up the remaining registrations from the Luck post office and deliver them to the election board in Hayward. Additionally, announcements regarding the election and of the need to register were broadcast over local radio stations, WOJB, Reserve, Wisconsin, and WHSM, Hayward, Wisconsin.

Notice of the election appeared in the Band's local news letter, and were posted at the Great Lakes Agency, Tribal Headquarters (LCO Administration Bldg), two LCO Elderly Centers and the LCO Grocery Store. Consequently, we do not find that using the wrong zip code materially affected the registration process.

You further contend that the Band's constitution disallows "absentee" voting in elections concerning tribal members. Elections to adopt or amend constitutions adopted under the provisions of Section 16 of the Indian Reorganization Act are governed by the Act and the Secretary's election regulations which were promulgated in accordance with the Act. 25 CFR 81.1(s) specifically defines Secretarial election to mean "an election held within a tribe pursuant to regulations prescribed by the Secretary as authorized by Federal Statute (as distinguished from tribal elections which are conducted under tribal authority.)" The distinctions between Secretarial and tribal elections were litigated in Cheyenne River Sioux Tribe v. Andrus, 566 F. 2d 1085 (8th Cir., 1977), cert. denied 439 U.S. 820 (1978). Thus, the requirements for tribal elections as set forth in the Band's constitution are not operative and do not constitute a violation of the Lac Courte Oreilles Constitution nor an infringement upon tribal sovereignty or a breach of trust responsibility.

Based on our review of the factors you used to justify declaring the election null and void, we find no evidence to warrant or justify such action on your part. Moreover, the IRA provides that the constitution and amendments thereto are effective from the date of adoption and approval by the Secretary of the Interior. No authority exists whereby a tribe may declare a Secretarial election void.

However, in order to ensure that the election was conducted properly, we looked beyond the issues raised by you and examined the election in its entirety. As we noted earlier, Section 16 of the IRA requires that amendment elections be conducted in the same manner as the original constitution and bylaws. The Secretary's regulations are consistent with this requirement. Thus, Section 81.6 (d) of the Secretary's regulations provides:

> For a reorganized tribe to amend its constitution and bylaws, only members who have duly registered shall be entitled to vote; provided, that registration is open to the same class of voters that was entitled to vote in the Secretarial election that effected its reorganization, unless the amendment article of the existing constitution provides otherwise.

The effect of this provision is that the initial election to adopt the constitution determines who will be qualified to vote in future elections. See The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. Morton, Civil No. 2357 (D. Mont. Dec. 17, 1973) (Flathead). The Flathead case held that "any future elections to amend the constitution ... must be conducted in the same manner as was the election to adopt the original constitution...." Thus, if only resident voters were allowed to vote in the September 3, 1966, constitutional election, with absentee ballots being permitted only for those resident voters temporarily absent from the reservation, ill, or physically disabled, then only that class of voters could vote in subsequent elections.

Thus, we examined the organizational files for the Lac Courte Oreilles Band dealing with the 1966 Secretarial election to adopt the constitution. While we did not find a copy of the voter's list, we did locate a copy of the election notice. The

election notice specified that the "proposed Constitution and Bylaws of the Lac Courte Oreilles Band of Chippewa Indians will be voted on at an election called for that purpose on September 3, 1966." It also identified who was entitled to vote in the election thusly:

> The following persons are eligible to vote:
>
> 1. Persons whose names are listed on the Lac Courte Oreilles Census Roll of January 1, 1940, and living on the reservation.
>
> 2. Descendants of the above people who are at least 21 years of age, and living on the reservation.
>
> 3. Persons who do not live on the reservation may vote if they are at least 1/2 degree Indian blood and their names appear on the January 1, 1940, Lac Courte Oreilles Census Roll.
>
> The above is in accord with the Indian Reorganization Act of June 18, 1934. Nonresident members may vote by Absentee Ballot and resident members will vote in the regular polling places on the reservation between the hours of 9 a.m. and 7 p.m., Central Daylight Time.

Based on the record, voting in the September 3, 1966, election to adopt the Constitution and Bylaws of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians was limited to residents of the reservation and those nonresident members who possessed at least 1/2 degree Indian blood and whose names appeared on the January 1, 1940, Lac Courte Oreilles

Census Roll. Therefore, in future elections to amend the Constitution and Bylaws of the Lac Courte Oreilles Band, only that class of voters, that is, adult Indians residing on the reservation and nonresident members of 1/2 degree or more, were entitled to vote in such elections.

Since the 1966 election, five elections have been held to amend the Band's constitution. It appears that absentee balloting for nonresidents regardless of blood degree may have been permitted in these amendment elections. Notwithstanding who was allowed to vote in these election, in light of the Flathead case, the initial election to adopt the constitution (1966) determines who will be qualified to vote in all future elections.

A preliminary analysis of the 1991 voter's list indicates that some 610 members registered to vote absentee. Of that 610, most, if not all, reside off the reservation. Further, only about 75 of those registered to vote absentee appear to possess one-half (1/2) degree or more Indian blood.

Because of the irregularities that have occurred with the February 1, 1992, election, we are faced with the options of (1) invalidating the Area Director's February 10, 1992, approval of the constitutional amendments; (2) invalidating the January 1, 1992, election and holding a second one; (3) issuing a finding that the irregularities did not affect the outcome of the election; (4) issuing a finding that the election was not contested within the challenge period allowed by the Secretary's regulations and the results therefore stand; and (5) affirming the Area Director's approval of the amendments. However, because the wrong class of voters were allowed to vote in the 1992 election and absentee voters did in fact determine the outcome of the election (474 voted absentee compared to 176 on-site) and has far reaching consequences,

we have no alternative but to declare the February 1, 1992, election null and void and so do. Accordingly, the Area Director's February 10, 1992, approval of proposed Amendments A and B, redesignated Amendments No. XXIII and XXIV, is hereby revoked.

Notwithstanding our revocation of a fatally flawed election, the IRA imposes upon the Secretary a duty to call and conduct Secretarial elections upon receipt of an appropriate tribal request. Since the petitioners' request was deemed a valid request by the Area Director and the only appropriate remedy provided for by the Secretary's regulations is the calling of a new election, we again have no alternative but to do so. Therefore, we will be directing the Minneapolis Area Director to call and conduct a new election on the proposed amendments in the near future. However, in view of the significance of the proposal to lower the blood quantum from one-quarter (1/4) to descendancy, the Superintendent will be directed to work closely with the Band's Governing Board to educate the members regarding the pros and cons of the proposed amendment. We trust you will cooperate and provide assistance in this matter. No doubt you will want to make your concerns and position known to Band members.

We share your concern about eliminating the blood quantum in favor of mere descendancy. The adoption of a low blood quantum or none at all or the adoption of individuals who do not meet the Band's automatic eligibility requirements for membership confuse the individual Indian status with a purely racial or biological classification rather than a bilateral, political relationship. While it is well established that Indian tribes have authority to determine membership in an Indian tribe, there is an equally fundamental principal that membership in an Indian tribe is a bilateral, political relationship which derives its legal significance and is

dependent upon an interaction between the individual and the tribal community. In Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court held that the constitutionality of special legislation for Indians derives not from the racial classification of the individual beneficiaries of the legislation but from the governmental status of Indian tribes and the unique status of their members. Indian tribes, as political governmental entities, should establish membership criteria which would be tied to some objective standard that would reflect a probable bilateral relationship between the individual and the tribe. Such criteria includes the imposition of a blood degree requirement solely or in combination with other criteria such as parental residency on the reservation where the child is born. Where tribal membership is determined by blood degree alone, a high degree of blood is normally required. This high blood degree requirement raises some inference of maintenance of tribal relations.

There is a substantial temptation for some tribes to increase the number of persons it considers members by lowering blood quantum or membership standards without regard to the extent to which the persons have actually maintained meaningful, bilateral relations with the tribe. Under Federal programs, the amount of money available to the tribe may be tied directly to the service population. Thus, increasing the tribal membership increases the dollars available to the tribal leaders to manage without diluting any of the tribe's assets. The danger of this process is that it weakens the bonds of tribal membership. Without meaningful interaction between the tribe and its members, the very logic and foundation of tribal jurisdiction and sovereignty are undermined. With the ever increasing attacks in these areas coupled with limits on Federal dollars available to Indian tribes, Indians tribes would do well to heed the danger and avoid it entirely by adopting realistic membership. If there ceases to exist a demonstrable

bilateral, political relationship between a tribe and its members, the courts or Congress may well decide that a tribe has so diluted the relationship between a tribal government and its members that it has "self-determined" its sovereignty away.

While petitioners did not at this time seek to eliminate the requirement that membership ordinances governing future membership, loss of membership and adoption are subject to Secretarial approval, we might note for the record that such ordinances are subject to Secretarial approval because they directly impact the trust estate and could expand membership beyond those persons who the Secretary on behalf of the United States has recognized as the tribal membership. Moreover, termination of membership involves loss of a substantial Federal right to participate in Federal benefits and tribal assets. Because a tribe nay substantially affect its makeup through the adoption process or may exact revenge on members with opposing viewpoints through the termination of membership, the Secretary must exercise his right to approve such an ordinance since the use of Federal dollars for contracts and grants for tribal government purposes are involved. Hence, the Secretary could not approve an amendment which eliminated Secretarial approval.

We apologize for the delays experienced in providing a more timely response. If we may be of further assistance in this matter, please let us know.

Sincerely,

/s/ David J. Matheson

Acting Assistant Secretary - Indian Affairs

AMENDED

CONSTITUTION AND BYLAWS

OF THE

LAC COURTE OREILLES BAND OF

LAKE SUPERIOR CHIPPEWA INDIANS

OF WISCONSIN

We, the members of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin, in order to secure the advantages of local self-government for ourselves and our children and to organize for our common welfare, do hereby establish this Constitution and Bylaws.

ARTICLE - TERRITORY

Section 1. Territory. The territory of this band shall extend to all lands and waters within the exterior boundaries of the Lac Courte Oreilles Reservation in Wisconsin, as established by Secretarial Order of March 1, 1873, and any lands or waters or interests therein which may be acquired outside of the reservation by or on behalf of the band, including the 1200 acres of Farm Services Administration land outside the reservation boundary held by the United States, except as may otherwise be provided by Federal law.

Section 2. Jurisdiction. The jurisdiction of the band shall extend to all lands and waters within the territory of the band, and further, for the purposes of exercising and regulating the exercise of rights to hunt, fish, trap, gather wild rice and other usual rights of occupancy, the jurisdiction of the band shall

extend to all lands and waters contained within the area described in Article I of the Chippewa treaty of October 4, 1842, or any other applicable treaty.

ARTICLE - MEMBERSHIP

Section 1. The membership of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin shall consist of the following persons:

(a) All persons of Lac Courte Oreilles Chippewa Indian Blood whose names appeared on the official census roll of the Band as of January 1, 1940, or whose names were eligible for inclusion in such rolls, PROVIDED, such persons are citizens of the United States and are not enrolled with another tribe, band or group of Indians. This roll will be the basic membership roll.

(b) Any lineal descendant of a member born prior to the effective date of this Constitution, PROVIDED, an application for enrollment is filed with the Governing Board and provided further, such person is not enrolled with another tribe, band or group of Indians.

(c) Any person gaining membership after the effective date of this Constitution through ordinances enacted under Section 2 of this Article.

Section 2. The Governing Board shall enact the ordinance subject to approval of the Secretary of the Interior stating the criteria for future membership and adoption of the new members. Such ordinance shall include the provision that to be eligible for membership persons born between November 2, 1966, and the effective date of this amendment (April 7, 1969) must possess at least 1/8 degree Lac Courte Oreilles

Indian blood. Persons born after the effective date of this amendment (April 7, 1969) must possess at least 1/4 degree Lac Courte Oreilles Indian blood in order to qualify for membership. Any amendments to the ordinance shall require approval of the Secretary of the Interior.

Section 3. Any person who has been rejected for enrollment as a member of the Band shall have the right of appeal to the Secretary of the Interior, whose decision shall be final.

Section 4. The Governing Board shall have the power to enact ordinances governing loss of membership, such ordinance subject to the approval of the Secretary of the Interior. The ordinance shall include a provision for appeal of decisions to the Secretary of the Interior.

ARTICLE III - GOVERNING BODY

Section 1. The governing body of the Band shall be the Governing Board composed of seven (7) members.

Section 2. Any member of the Band is eligible to be elected to the Governing Board, PROVIDED, he is 21 years of age or older on the date of the election.

Section 3. Following the convening of each new Governing board elected pursuant to this Constitution, the Board shall select from within its membership a chairman and a vice-chairman to serve until a successor Board is duly elected and seated. The Board shall convene no later than fifteen (15) days following each election.

Section 4. At the first meeting following an election, the Governing Board shall select from within or without the

Board a secretary/treasurer to serve for a period to be stated in a resolution passed by the Governing Board. The chairman and vice-chairman of the Board shall be ineligible to serve as secretary/treasurer. If a secretary/treasurer is selected from without the board he shall not vote as a member of the Board.

Section 5. The chairman and vice-chairman and members of the Board shall remain in office until the new Board members have been elected and seated.

Section 6. The Governing Board, by resolution, shall determine its own procedures. The Governing Board, by resolution, may provide for the hiring of clerical or other employees.

Section 7. The Governing Board by affirmative vote of six (6) of its members shall remove any board member for any of the following reasons, PROVIDED, the accused member has been given an opportunity to answer written charges against him.

(a) Failure to carry out his official duties.

(b) Absence from three (3) successive regularly scheduled board meetings without an excuse acceptable to a majority of the members of the board.

(c) Conviction of any offense involving moral turpitude or conviction of a felony.

(d) Misuse of authority.

Section 8. The Governing Board by an affirmative vote of four (4) of its members shall temporarily fill by appointment until the next regular election any vacancy occurring on the

Board. Said appointee shall serve until the next regular election. Should the next regular election occur in the midst of the original term, the tribal membership shall elect an individual to serve the final year of the original term.

ARTICLE IV - ELECTIONS

Section 1. Qualified voters shall be all members of the Band eighteen (18) years of age or over.

Section 2. The first election of a Governing Board shall be called, held and supervised by the Superintendent of the Great Lakes Agency and the existing governing body within sixty (60) days of approval of this Constitution and Bylaws.

Section 3. The Governing Board shall prescribe rules and regulations conducting all subsequent elections. Such rules and regulations shall include, but not limited to, the following:

(a) Voting shall be by secret ballot.

(b) Beginning in 1979, elections shall be held every year in the month of June.

(c) Absentee voting, provided that absentee voting shall be limited to persons who verify that they are unable to vote at designated polling places on the date of an election because of confinement in a nursing home, hospital or other health care facility, or because of service in a branch of the United States Armed Forces.

(d) Filing and posting of election notices.

Section 4. After the expiration of the terms of office of the Board members sitting in 1978, all Board members shall be elected for a term of two (2) years, except as further provided by this section.

In 1979, there shall be five (5) Board members elected. The two (2) candidates receiving the highest number of votes in the 1979 election shall be elected to serve for a term of two (2) years; and the three (3) candidates receiving the next highest number of votes in the 1979 election shall be elected for a term of one (1) year. Thereafter, three (3) board members shall be elected each even-numbered year, the four (4) board members shall be elected each odd-numbered year.

Section 5. The candidates receiving the greatest number of votes shall be elected to fill vacant two year terms of office.

The candidates receiving the next greatest number of votes shall be elected to fill the unexpired year of such board positions as may be vacant.

ARTICLE V - POWERS OF THE GOVERNING BOARD

Section 1. The Governing Board shall exercise the following powers subject to the limitation imposed by this Constitution and Bylaws and by applicable treaties between the Chippewa Nation and the United States.

(a) To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior.

(b) To prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other assets.

(c) To negotiate, make and perform contracts and agreements of every description, not inconsistent with law or with any provisions of this Constitution, with any person, association, or corporation, with any county, or with the State of Wisconsin or the United States.

(d) To advise the Secretary of the Interior on all appropriation estimates or Federal projects for the benefit of the Band.

(e) To negotiate with Federal, State and local governments.

(f) To manage, lease, permit or otherwise deal with tribal lands, interests in lands or assets, or to purchase lards or to otherwise acquire lands, or interests in lands within or without the reservation. Tribal lands shall not be sold, except by petition signed by seven (7) members of the Governing Board requesting the Secretary of Interior to have introduced appropriate authorizing legislation provided that upon enactment of authorizing legislation the sale of lands shall be subject to approval by a majority of the qualified voters of the Band voting at a referendum called for that purpose.

(g) To adopt ordinances by which tribal lands may be assigned or leased for beneficial use and occupancy of members of the Band.

(h) To engage in any business that will further the social or economic well-being of members of the Band or undertake any programs or projects designed for the economic advancement of the people.

(i) To borrow money from the Federal Government or other lenders for Band use and to make loans to Band members in accordance with regulations of the Secretary of the Interior, this Constitution and other applicable laws.

(j) To administer any funds within the control of the Band; to make expenditures from available funds for public purposes, including salaries or other remuneration of Band officials, employees or members. Such

* * *

This Constitution and Bylaws contain the following amendments:

Amendment I approved April 3, 1969

Amendments II through X approved December 23, 1974

Amendments XI through XIV approved December 21, 1978

Amendments XV through XVIII approved August 25, 1980

Amendments XIX through XXII approved September 23, 1986

****

CERTIFICATION

I, the undersigned, hereby certify that the foregoing is a true and complete copy of Lac Courte Oreilles' Constitution and Bylaws, and is the original Constitution & Bylaws as approved November 2, 1996 with subsequent amendments as noted above.

s/_____
Eugene Begay Sr.
Member Lac Courte Oreilles
Tribal Governing Board

Dated this 31st day of December 1997.

Signed and sealed
before me on this
31st day of
December 1997

/s/ Larry B. Leventhal

AMENDMENT
Constitution and Bylaws
of the
Lac Courte Oreilles Band of
Lake Superior Chippewa Indians

ARTICLE II - MEMBERSHIP

Section 2.
Shall be amended as follows:

> The Governing Board shall enact the ordinance subject to approval of the Secretary of the Interior stating the criteria for future membership and adoption of the new members. Such ordinance shall include the provision that to be eligible for membership persons must possess Lac Courte Oreilles Indian blood and must be a lineal descendant of an enrolled member. Any amendments to the ordinance shall require approval of the Secretary of the Interior.

APPROVAL

I, Michael A. Fairbanks, Acting Area Director, Minneapolis Area Office, Bureau of Indian Affairs, Minneapolis, Minnesota by virtue of the authority granted to the Secretary of the Interior by the Act of June 18, 1934 (48 Stat. 984) as amended, and delegated to me by 230 DM 2.4 do hereby approve the foregoing Amendment No. XXIII to the Constitution and Bylaws of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians. It is effective as of this date: Provided, that nothing in this document shall be construed as authorizing any action under this document that would be contrary to Federal Law.

s/ Michael A. Fairbanks
Acting Area Director

February 10, 1992
Minneapolis, Minnesota

AMENDMENT
Constitution & Bylaws
of the
Lac Courte Oreilles Band of
Lake Superior Chippewa Indians

ARTICLE IV - ELECTIONS

Section 4.
Shall be amended as follows:

In 1992, three (3) Board members shall be elected to serve a one-time three year term.

Beginning in 1993, four (4) Board members shall be elected to serve a four (4) year term. Thereafter, all Board members shall serve four (4) year terms. Consequently, beginning in 1993, elections shall be held every two (2) years (or every odd-numbered year).

APPROVAL

I, Michael A. Fairbanks, Acting Area Director, Minneapolis Area Office, Bureau of Indian Affairs, Minneapolis, Minnesota by virtue of the authority granted to the Secretary of the Interior by the Act of June 18, 1934 (48 Stat. 984) as amended and delegated to me by 230 DM 2.4 do hereby approve the foregoing Amendment No. XXIV to the Constitution and Bylaws of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians. It is effective as of this date: Provided, that nothing in this document shall be construed as authorizing any action under this document that would be contrary to Federal Law.

s/ Michael A. Fairbanks
Acting Area Director

February 10, 1992
Minneapolis, Minnesota

—

Supreme Court, U.S.
FILED
MAY 12 2000
CLERK

(2)

No. 99-1520

In the Supreme Court of the United States

TRIBAL GOVERNING BOARD OF THE
LAC COURTE OREILLES BAND
OF LAKE SUPERIOR CHIPPEWA INDIANS,
Petitioner,

v.

SANDRA THOMAS, ET AL.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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44PP

QUESTIONS PRESENTED

1. When a Tribe's constitutional amendment process under the Indian Reorganization Act is pursued by petition directly from the tribal membership, and the official Spokesperson for the Petitioners brings an action to enforce Federal approval of the amendments ratified by the tribal membership in a Secretarial election, is a tribal council necessary under Fed. R. Civ. P. 19(a), such that the action to complete the petitioners' amendment process cannot proceed without its joinder?

2. Is the tribal council necessary to claims under the IRA, the APA, and the United States Constitution brought by the Spokesperson for the Petitioners against the BIA for failing to follow statutory and constitutional laws in the conduct of a Federal Secretarial election?

3. If the tribal council is necessary and the council members are joined under *Ex parte Young* for acting outside their authority and interfering with plaintiffs' voting rights in a federal election, is the tribal council itself indispensable?

4. If the tribal council is indispensable, has its immunity been abrogated by Congress in the IRA for actions to enforce approval of Secretarial elections such that it may be joined to complete the amendment process?

LIST OF PARTIES

Plaintiffs are members of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians [LCO]. Sandra Thomas is the official Spokesperson, as defined in 25 C.F.R. §82.1(o) [RA 3], for the petitioners who sought to amend their tribal constitution. She lives on the LCO reservation. Robert Sander is an LCO elder who lives about 20 miles off the LCO reservation. Mike Nalewaja is an LCO member who lives about 60 miles off the LCO reservation. Sander and Nalewaja lost their federal voting rights in Secretarial elections as a result of a Bureau of Indian Affairs agency decision. Tina Thomas is the daughter of Sandra Thomas. She lives on the LCO reservation and is eligible for membership under an amendment ratified by the tribal members but overturned by the Bureau of Indian Affairs.

Original Defendants are the United States, the Department of Interior and the BIA, Secretary of Interior Bruce Babbitt, and Assistant Secretaries of Interior: Dr. Eddie F. Brown, Ada E. Deer, and Kevin Gover, the current Assistant Secretary of Interior for Indian Affairs (noted on appeal). Dr. Brown also was sued in his individual capacity. Deputy Commissioner of Indian Affairs David Matheson was sued in his official and individual capacities. Respondents do not know who has replaced Mr. Matheson.

Defendants/Petitioner: Plaintiffs joined the Governing Board [TGB] and its members only when the district court held they were necessary to the action. "Joined defendants" included the council members in their official and individual capacities: Eugene Begay, Donald E. Carley, Constance Corbine, Margaret Diamond, Gaiashkibos, Michael Isham, Jr., and Alfred Trepania. On information and belief, Eugene Begay has been replaced by Art Tainter. The TGB petitioned this Court for the writ.

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OPINIONS BELOW

The Seventh Circuit opinion is reported at *Thomas, et al. v. United States, et al.*, 189 F. 3d 662 (7th Cir. 1999). The slip opinion is in the Petitioner's Appendix at A-1. The Seventh Circuit made two corrections to the slip opinion prior to printing. It changed the incorrect reference from a "September 1" 1992 election on page A-10, to "February 1" election. It also changed the reference from "Id." at the end of the first full page on the slip opinion, page A-3, to 25 U.S.C. § 476(d)(2). *Thomas*, 189 F.3d at 665, 668.

Petitioners' Appendix [A] includes the decisions and judgment of the District Court for the Western District of Wisconsin. The BIA decision, also known as the "Matheson decision," is the federal agency decision that is the subject of the lawsuit. It is reprinted at A-59 to A-72.

JURISDICTION

Respondents do not object to the Petitioner's statement, except to the extent it asserts review is appropriate under Supreme Court Rule 10(a) and (c).

LAWS INVOLVED IN THE CASE

The following are references to the federal laws, relevant portions of which are included in Respondents' Appendix [RA]:

25 U.S.C. §476,
42 U.S.C. §1985(3),
5 U.S.C. §706,
25 C.F.R. Parts 81 and 82,
United States Constitution: Fifth, Ninth, Fifteenth and Twenty-Sixth Amendments.

STATEMENT OF THE CASE

Respondents offer the following as the correct account of the case:

Factual Background

In 1966, members of the Lac Courte Oreilles [LCO] Band adopted a tribal constitution and bylaws pursuant to the Indian Reorganization Act [IRA], "in order to secure the advantages of local self-government for [them]selves and [their] children." [A. 73] The constitution guaranteed equal political rights to all tribal members, and provided that any amendments to it may be initiated *either* by request from the Governing Board [TGB] *or* directly by petition from the members. [R. 28 (Joint Proposed Stipulated Facts), ¶25, 29] The IRA and the implementing regulations were structured to recognize either such request as a valid request from a Tribe to amend its constitution. 25 U.S.C. §476(a), (c)(1)(B), and 25 C.F.R. §81.5(a), (b), (d). [RA 1-3]

In the late 1980s, several LCO members began to consider possible amendments to their constitution to provide for separation of powers, an independent judiciary, governmental checks and balances, protection of civil rights, and a new definition of the tribal membership criteria. [R. 28, ¶37-39; R. 22, ¶7] Members held meetings to discuss suggested amendments. [R. 28, ¶39] In 1988, Sandra Thomas was named chairperson of the committee formed to explore the constitutional amendment issues and process. [R. 28, ¶37] The committee drafted and circulated petitions with proposed amendments to the constitution. [R. 28, ¶37-40] These petitions were submitted directly to the BIA by Sandy Thomas in 1991, bypassing the TGB. [R. 28, ¶39-41] No one challenged the validity of any signature on the petitions. [R. 28,

¶42] The BIA determined that some petitions were "stale," and the BIA refused to act on them. [R. 28, ¶44]

The BIA accepted two of the petitions as valid. [R. 28, ¶45] Sandy Thomas was named the official "Spokesman [sic] for the Petitioners" as defined in 25 C.F.R. §82.1(o) [R. 28, ¶43; RA 3], and the federal Secretarial election process under the IRA, 25 U.S.C. §476, was begun. [R. 28, ¶46; RA 1-2] The BIA sent TGB Chairman Gaiashkibos and Sandy Thomas copies of its internal memo to all Area Directors stating the time limits binding on the BIA in Secretarial elections, including that the Secretary must approve or disapprove amendments on "Day 135" after the filing of petitions. [R. 28, ¶48, 22-23] The registered voter list was posted and no one objected to anyone's qualification or eligibility to vote. [R. 28, ¶53]

On February 1, 1992, the Secretary of the Interior, as authorized by Congress in the IRA, conducted a federal Secretarial election to ratify the two proposed amendments to the LCO constitution. [R. 28, ¶58] Pursuant to 25 C.F.R. §81.6(a)(1), all adult tribal members were allowed to register to vote, and the members approved the two amendments.[1] [R. 28, ¶57-59, 63]

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[1]The Secretarial election had the highest voter turn out in LCO history. [R.22, ¶10] Of 3,659 adult tribal members sent election packets, 1,130 registered and became eligible to vote. 25 C.F.R. §81.6(d). [R. 28, ¶52] Of those registered and eligible to vote, 650, or 57.5%, actually voted in the election. [R. 28, ¶59] Amendment A, which changed the definition of eligibility for tribal membership, was approved by the LCO People in a vote of 542 to 105; Amendment B, which changed the length of term of office of TGB members, was approved by a vote of 373 to 274. [R. 28, ¶63]

The Great Lakes Agency transmitted the election results to the Minneapolis Area Office. Two challenges to the election filed within the 3-day challenge period under 25 C.F.R. §81.22 were denied. [R. 28, ¶66-71, 76-78] On February 10, 1992, the Acting Area Director formally approved the amendments in writing and returned the approved amendments to LCO.[2] [R. 28, ¶72; A. 81-85] Notice of the approved amendments was sent by letter dated February 13, 1992, to TGB Chairman Gaiashkibos and Sandy Thomas. [R. 28, ¶75] The Secretary did not disapprove the election within the statutory 45-day time limit allowed to review the election. [R. 28, ¶81] Copies of the amended constitution were printed by the Tribe. [R. 28, ¶82]

When Sandy Thomas and others approached the TGB about how the amendments would be implemented, they were rebuffed. [R. 22, ¶11] On April 16, 1992, Gaiashkibos declared the federal election "null and void" and notified the BIA that he refused to implement the approved amendments. He and some of the members of the tribal council then passed a resolution to "not recognize" the two amendments on April 18. [A. 44]

As the Seventh Circuit found, on April 24, 1992, "well beyond the 3-day time period provided by 25 C.F.R. §81.22 to challenge a Secretarial election, and a month or more after the end of the 45-day period within which the Secretary had to approve or disapprove the election under 25 U.S.C. § 476(d)(1)), [Gaiashkibos] sent letters to Dr. Eddie F. Brown, then-Assistant Secretary of the Interior for Indian Affairs, asking that the decision to approve the election results be reviewed and reversed." [A. 3] *Thomas*, 189 F.2d at 665. [R. 28, ¶83-85] Sandy Thomas wrote to Dr. Brown, seeking his help on behalf

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[2]Approval authority for Secretarial elections has been delegated by the Secretary to the Area Directors since the mid-1970s. [R. 28, ¶17]

of the LCO People in getting the TGB to follow the approved amendments, and pointing out that the time to object to the election had passed. [R. 28, ¶84, 86; A. 44]

The Great Lakes Agency office sent Gaiashkibos' April 24 letter to the Area Office,[3] but noted that, "It is the position of this office that this is not a valid issue because the timeframe for contesting the results in 25 C.F.R. Part 81, is very specific, at best the issue is moot." [R. 28, ¶87] The letter from Gaiashkibos was dated 83 days after the February 1 election. [R. 22, ¶42]

In June 1992, at the direction of Gaiashkibos, tribal member Eugene Begay met with Ronal Eden, Director of the Office of Tribal Services, Pat Simmons and Robert Delaware in Washington, D.C., to discuss the election and "the problem at Lac Courte Oreilles concerning lineal descendancy." [R. 28, ¶89, 91; See also A. 44] Begay sent a follow-up letter to Mr. Eden in August 1992. [R. 28, ¶91, 111] This meeting was *ex parte*. Sandy Thomas was not notified of the meeting. [R. 22, ¶12]

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[3]The petition referred to by the TGB [Pet. p. 3] was submitted to the BIA by letter from Gaiashkibos on May 2, 1992, and received by the BIA on May 5, 1992, *after* the TGB had declared the election "null and void," *after* Gaiashkibos' April 24th letter to Dr. Brown seeking to overturn the election, and *after* the deadline for Secretarial review of the election had expired. [A. 59] The petitioners, numbering fewer than the losing voters on one of the amendments, asked TGB members not to recognize the Secretarial election because they felt everyone had not been able to vote. However, some of those who signed the petition later lost their right to vote under the Matheson decision.

On October 7, 1992, David Matheson, as Acting Assistant Secretary for Indian Affairs, revoked approval of the amendments. [R. 28, ¶98] The decision was signed by Matheson, but was authored primarily by those who had met with Eugene Begay, i.e., Patricia Simmons and reviewed by Robert Delaware and Scott Keep, Assistant Solicitor, [R. 28, ¶92, 95]

Matheson did not overturn the election for the reasons urged by Gaiashkibos in his April 24 letter. [R. 28, ¶96] Matheson said, "Based on our review of the factors you used to justify declaring the election null and void, we find no evidence to warrant or justify such action on your part. ....No authority exists whereby a tribe may declare a Secretarial election void." [A. 66] Matheson instead raised a new issue as a basis for overturning the election. [R. 28, ¶92, 95]

Matheson acknowledged that Secretarial elections are Federal elections, as opposed to tribal elections [A. 66; R. 28, ¶ 96], and ruled that Gaiashkibos' claim that not enough members voted was incorrect. [A. 64-65] He also pointed out that since this was a federal Secretarial election conducted by the Secretary of Interior, as opposed to an internal tribal election, federal regulations governed the election. [A. 66]

Though Matheson rejected the challenges raised by Gaiashkibos, he stated that he "looked beyond" those issues and determined that the election was flawed. [R. 28, ¶91; A. 67] Matheson cited language in the IRA that stated that amendment elections had to be conducted "in the same manner" as elections to adopt a tribal constitution.[4] [R. 28, ¶100, 103; A. 67] He

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[4]The federal defendants admitted below that the language of the IRA on which Matheson relied, that amendment elections must be

reasoned that an amendment election could only be conducted "in the same manner" if the election was limited to the same voters who were allowed to vote when the constitution was adopted. [R. 28, ¶100, 103; A. 67] Returning to 1966 when LCO first adopted its IRA constitution, he ruled that in future federal Secretarial elections at LCO, only that "class" of voters who voted in 1966 would be allowed to vote.[5] [R. 28, ¶104; A - 67-79]

According to Matheson, only those tribal members who reside on-reservation, and those tribal members living off-reservation if they have ½ degree LCO blood quantum, will be allowed to vote in federal elections to amend the LCO constitution.[6] [R. 28, ¶107; A. 69] This decision significantly

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conducted "in the same manner" as elections to adopt the constitution, was deleted from the IRA in 1988 – four years before the 1992 election. [R. 28, ¶103] The IRA now provides that adult tribal members must ratify amendments. There is no requirement to conduct elections "in the same manner" as original elections. 25 U.S.C. §476(a); RA 1.

[5]The 1966 election also had a 21-year old voter requirement. Plaintiffs' claim that trying to turn the clock back to 1966 violates the Twenty-Sixth Amendment as well. [A. 68, R. 2, ¶64] The federal defendants later conceded that the Twenty-Sixth Amendment binds the BIA in Secretarial elections. [See, e.g., R. 34, p. 18]

[6]In 1966, there was no technical definition of who was an LCO tribal member. The technical definition came with the adoption of the IRA constitution and changed over the years from lineal descendancy, to 1/8, to 1/4, and then back to lineal descendancy in 1992. [E.g., R. 28, ¶27-28] Plaintiffs liken Matheson's turning the clock back to 1966 to limiting United States citizen voters to whomever was considered a citizen in 1789 (e.g., 21-year old white, propertied males) though the definition of who was a citizen had changed. [R. 42, ¶15]

changed the eligible voters for Secretarial elections at LCO.[7] In all prior amendment elections at LCO since the constitution was adopted, all adult tribal members had been eligible to vote regardless of blood quantum. Matheson effectively disenfranchised about one-half of the adult tribal voters, including those who had voted in every prior amendment election, such as plaintiff Bob Sander. [R. 22, ¶60]

Matheson made no mention of the statutory 45-day time limit placed on the Secretary by Congress to review and approve or disapprove an election. He cited no authority by which he could act beyond the 45-day time limit of 25 U.S.C. §476(d)(1).[8] He held that the petitions submitted to the BIA were valid petitions and the Secretary was under a Congressional mandate to hold the election. [R. 28, ¶99; A. 70] He stated that he would direct the Area Director to hold the replacement election "in the near future." [R. 28, ¶99; A. 70] However, no replacement election has been held in eight years.

Matheson did not find that the amendments themselves violated the law and the federal defendants admit that they do not violate applicable laws. [R. 28, ¶108] Matheson stated, however, that he "shared [Gaiashkibos'] concern about eliminating the blood quantum in favor of mere descendancy." [A. 70] He said that Indian tribes "would do well to heed the danger and avoid it entirely by adopting realistic membership."

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[7]These adult tribal members still are allowed to vote in *tribal* elections for tribal officials, but they are disenfranchised from voting to amend or even petitioning to amend their own constitution in the *federal Secretarial* election process under the IRA. [E.g., R. 28, ¶14-15]

[8]The 45-day time limit on the Secretary to review an election was adopted by Congress in 1988 amendments to the IRA. [R. 28, ¶79-81] Matheson's letter was dated 249 days after the election. [R. 22, ¶43]

[R. 28, ¶109; A. 71]

Matheson rejected the issues raised by Gaiashkibos, but Gaiashkibos never appealed the decision. [A. 1-11] *Thomas*, at 669. Instead, on October 20, 1992, Eugene Begay wrote to "Dear Dave" stating he concurred "with [Matheson's] analysis of the problems of descendancy membership in Tribes." [R. 28, ¶111] Begay wrote that he would remind Gaiashkibos to follow up on the matter of the new Secretarial election and thanked Matheson for accommodating Gaiashkibos and himself with Matheson's presence whenever they were in D.C.[9] [R. 28, ¶111]

Sandy Thomas immediately appealed the decision pursuant to the Administrative Procedures Act [APA] in November 1992. [R. 22, ¶13; R. 28, ¶113-114; A. 45] Among other things, she pointed out that the time to review the election had expired, and that the decision had illegally disenfranchised 1,800 adult LCO tribal members without due process. [R. 22, ¶13] The federal defendants admitted that they received the appeal sent by Sandy Thomas, but they said they lost it. [R. 28, ¶113]

Sandy Thomas then sought to educate the TGB about the Matheson decision. As a practical matter, Sandy Thomas pointed out that blood quantum information is confidential and it is not possible to tell from someone's address if they live on or off-reservation, so the voter criteria imposed by Matheson essentially left the LCO People with a secret voter list. [E.g., R. 28, ¶106; R. 22, ¶3, 14]

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[9]In 1992, Gaiashkibos was the President of the National Congress of American Indians. [R. 22, ¶47]

On at least four occasions between 1992 and 1995, the BIA reminded Gaiashkibos that the replacement election mandated by Congress would need to be held soon. [R. 28, ¶99, 112, 116, 117] In May 1995, the Superintendent of the Great Lakes Agency wrote to Washington for further direction on holding the replacement election. He wrote that he had again reviewed the petitions and sufficient signatories met the new Matheson voter criteria. [R. 28, ¶118]

In July 1995, Eugene Begay again met with Assistant Solicitor Scott Keep, this time to discuss what language in a tribal resolution would permit a new Secretarial election without first having to conduct a replacement election on the petitioners' proposed 1992 amendments, i.e., to prevent an election on the petitions. [R. 28, ¶125] Begay faxed to Attorney Keep a draft tribal resolution captioned "Dismissal Secretarial Election Held February 1, 1992." [R. 28, ¶126] Attorney Keep faxed a response to Begay with handwritten notes, "Gene - Call me if you can not read my hand-written suggested changes." The handwritten suggested changes included adding erroneous language that, "a new election was not authorized" and "Whereas the TGB has only recently learned that the BIA intended to call a new election on the old February 1, 1992, proposals, and --". [R. 28, ¶127] The TGB had been aware of the need for a replacement election since the Matheson decision, as well as from the frequent reminders from the local BIA offices. [R. 28, ¶99, 112, 116, 117; A. 45] The BIA also was aware since the Matheson decision, despite crafting the resolution, that the requirement that the Secretary hold the election was a mandate from Congress which the TGB could not preempt. Nevertheless, the TGB adopted the resolution with the language suggested by Attorney Keep. [R. 28, ¶128]

By 1996, Sandy Thomas had convinced several TGB members that the use of absentee ballots was not the reason why

Matheson revoked the election and that absentee ballots are authorized in Secretarial elections under the federal regulations. Vice-Chairperson Margaret Diamond wrote to the Superintendent of the Great Lakes Agency on May 16, 1996, requesting review of the Matheson decision. She wrote that several tribal members were concerned that people would be excluded from voting in another Secretarial election, specifically that off-reservation members with less than ½ degree LCO blood quantum would not be allowed to vote. [R. 28, ¶131] The Superintendent transmitted the letter from Vice-Chair Diamond to the Area Director by memo dated May 24, 1996. The Superintendent noted that "on May 16, 1995, we sent a memorandum to the Assistant Secretary - Indian Affairs, through your office, requesting a determination on the above referenced 1992 Secretarial Election...To date, we have not received a response to this request." [R. 28, ¶132] The Area Director sent the requests to the Office of Tribal Services in Washington in July 1996. [R. 28, ¶133]

Proceedings Below

On October 2, 1996, Sandy Thomas and the other plaintiffs brought this action in the Federal District Court for the Western District of Wisconsin. [R. 22, ¶41] The BIA still had not responded to Vice-Chair Diamond's letter. Though the TGB is correct in stating that nearly four years had passed since the Matheson decision when the lawsuit was filed, they were not four years of inaction and acceptance of the Matheson decision as suggested by the TGB's petition.

Plaintiffs alleged four causes of action. [R. 2] First, Plaintiffs sought statutory approval of the amendments; i.e., in effect, to have the prior, timely approval of the amendments enforced by overturning the untimely Matheson decision. [R. 2, ¶1-52] This action was against the United States, the BIA and

its officials pursuant to 25 U.S.C. §476(d)(2) for declaratory and injunctive relief. [R. 2, ¶79] Plaintiffs asserted that jurisdiction and an abrogation of federal immunity was provided at 25 U.S.C. §476(d)(2). [R. 2, ¶6]

Second, plaintiffs sought to have the Matheson decision declared invalid and unconstitutional pursuant to 5 U.S.C. §702 and 706 [RA 4], as being arbitrary and capricious for relying on outdated law, unconstitutional for lack of due process and imposition of a blood quantum-based voter criteria, and otherwise in violation of federal law. [R. 2, ¶1-60] Plaintiffs alleged that the new federal voter criteria created by Matheson violated the IRA and the Fifth, Ninth, Fifteenth and Twenty-Sixth Amendments to the United States Constitution. [R. 2, ¶54-57, 62-64; RA 5] This action was against the United States, the BIA and its officials for declaratory and injunctive relief under the APA. [R. 2, ¶80-83] Plaintiffs alleged that jurisdiction and an abrogation of federal immunity was provided at 5 U.S.C. §702. [R. 2, ¶6]

Third, plaintiffs alleged that the BIA violated its trust responsibility to them as LCO People by its unlawful and unconstitutional conduct in the Matheson decision and its aftermath, for which it had failed to follow its own regulations and the statutes binding it. [R. 2, ¶1-78] In the alternative, if the Matheson decision were upheld, plaintiffs alleged the BIA violated its trust responsibility to the LCO People to hold a replacement election in (then) over four years. [R. 22, ¶76] This action was against the United States for compensatory damages, and jurisdiction was asserted pursuant to 28 U.S.C. §1346(a)(2) and 1367. [R. 2, ¶85-86] Plaintiffs asserted that these provisions and 25 U.S.C. §476 provided the abrogation of federal immunity for this claim. [R. 2, ¶6]

Fourth, Plaintiffs sought to hold individual federal defendants responsible for the violations of the Fifth, Ninth, Fifteenth and Twenty-Sixth Amendments caused by the Matheson decision, pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). [R. 2, ¶1-72] This action was against Brown and Matheson individually for compensatory and punitive damages. [R. 2, ¶84] Plaintiffs sought monetary damages of $100,000 and $150,000. [R. 2, ¶84, 86] Plaintiffs sought such other relief as the court deemed appropriate pursuant to 28 U.S.C. §2201 and 2202, and costs and attorneys fees under the Equal Access to Justice Act, 28 U.S.C. §2412. [R. 2, ¶5]

In 1997, plaintiffs moved for summary judgment and the federal defendants moved for judgment on the pleadings or in the alternative for summary judgment. [R. 20, 29] In October 1997, the district court found that it had jurisdiction over the claims and the plaintiffs had standing to pursue them. [R. 54; A. 50-52] It dismissed the *Bivens* claims against Brown and Matheson, holding that the court did not have personal jurisdiction over the defendants under *Stafford v. Briggs*, 444 U.S. 527 (1980). The district court held it had personal jurisdiction over Brown and Matheson regarding the claims against them in their official capacity but simultaneously did not have personal jurisdiction over them for the *Bivens* claims. [A. 49] Finally, the district court held that the TGB of LCO was a necessary party to the remaining claims and stayed the proceedings to allow the TGB to join the lawsuit. [A. 56]

In May 1997, the TGB had taken a formal position to support the plaintiffs in the lawsuit. [R. 22, ¶46; A. 45] By October 1997, Gaiashkibos had been reelected to the TGB and the TGB then refused to join the lawsuit. [R. 55] Plaintiffs amended their complaint and named them as "Joined Defendants." [R. 56]

Plaintiffs sought declaratory and injunctive relief against the joined defendants for their violations of the IRA, and their support of the Constitutional violations of the Matheson decision. [R. 56, ¶1-99] This action was against the TGB and its members in their official capacity. Plaintiffs alleged jurisdiction for this cause of action under the IRA and the United States Constitution. [R. 56, ¶89] Plaintiffs asserted that Congress abrogated immunity in the IRA itself at 25 U.S.C. §476(d)(2). [R. 56, ¶90, 97-98] Plaintiffs also asserted that even if the IRA contained no abrogation, the actions of the TGB members exceeded the scope of their authority in Secretarial elections and therefore there was no immunity under the doctrine of *Ex parte Young,* 209 U.S. 123 (1908) and *Wisconsin v. Baker,* 698 F.2d 1323 (7th Cir. 1983). [R. 56, ¶90, 97]

Against TGB members individually, plaintiffs sought to have Eugene Begay (not a TGB member at the time) and certain members of the TGB held accountable for their actions interfering with tribal members' federal voting rights, seeking to disenfranchise tribal members of less than a certain age and blood quantum, and restricting tribal members' right to travel, in violation of the United States Constitution. [R. 56, ¶ 112-114] This action was for declaratory, injunctive and compensatory relief pursuant to 42 U.S.C. §1971 and 1985(3). [R. 56, ¶1-110, 112-114; RA 5] Plaintiffs asserted that the TGB members could not claim tribal immunity because their actions were unlawful and unconstitutional interference with a federal election, outside their scope of authority, and they were not entitled to official or qualified immunity for such actions. [R. 56, ¶90, 97] Plaintiffs asserted that jurisdiction for these claims was provided under these statutes, and the protections of the Fifth, Ninth, Fifteenth, and Twenty-Sixth Amendments to the United States Constitution applicable to federal Secretarial elections, and the IRA, provided the bases for the private causes of action. *See*, e.g., A. 3; *Thomas*, at 664-665. Plaintiffs sought damages

consistent with their demand against the BIA. [R. 56, ¶114]

On March 27, 1998, the district court held that the TGB was indispensable to plaintiffs' IRA claims against the BIA but the TGB was immune from suit. [R. 66; A. 36-37] The district court also held that the plaintiffs had not stated causes of action under 42 U.S.C. § 1985(3) because they had "failed to establish that federal rights are involved." [A. 36] The district court failed to address the absence of immunity under *Ex parte Young*. The court dismissed plaintiffs' claims and plaintiffs appealed in May 1998. [R. 67, 68]

On September 9, 1999, the Seventh Circuit reversed the district court and remanded for further proceedings. [A. 1-13] *Thomas v. U.S.*, 189 F.3d 662 (7th Cir. 1999). The Seventh Circuit held that the TGB was not necessary to the plaintiffs' IRA, APA, and trust responsibility claims against the BIA and federal officials. [A. 12] *Thomas*, at 669. The Seventh Circuit held that the district court, in believing the case dealt with a tribal election, "fundamentally misapprehend[ed] the limited role of the tribal government in a federal Secretarial election." [A. 8] *Thomas*, at 667. The Seventh Circuit noted that at its base, the lawsuit "is a challenge to the way certain federal officials administered an election for which they were both substantively and procedurally responsible," and not the substance of an amendment or the internal workings of the Tribe. *Ibid.*

Plaintiffs argued to the Seventh Circuit that if the TGB was not necessary and not a party, the plaintiffs would not pursue their claims against the TGB and its members merely to keep them in the lawsuit at this time. If, however, the TGB and its members were necessary parties, plaintiffs argued that the case should proceed with their joinder under the abrogation of immunity in the IRA and/or under the doctrine of *Ex parte Young*, and the plaintiffs would indeed proceed with their claims

against the TGB and its members. Since the Seventh Circuit held the TGB was not necessary to the lawsuit, they accepted plaintiffs' offer and treated the plaintiffs' claims against the TGB and its members as temporarily abandoned. [A. 12] *Thomas*, at 669.

The Seventh Circuit stated that Matheson "purported to revoke" the approval of the election and specifically called the Matheson decision "belated." [A. 3, 10] *Thomas*, at 668. This was argued extensively by the parties, and in particular by the BIA which asserted it was not bound by the IRA's 45-day time limit. The BIA had argued that *Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt*, 107 F.3d 667 (8th Cir. 1997), stood for their proposition that there was no time limit on the Secretary's review authority. The case was cited by the Seventh Circuit only to show the breadth of the Secretary's discretion to disapprove an election within the 45-day time limit includes reviewing the election for voter eligibility challenges. [A. 8] *Thomas*, at 667.

On December 13, 1999, all members of the original panel voted to deny the TGB's request for rehearing on the unanimous decision. No active member of the Seventh Circuit requested a vote on the TGB's request for rehearing en banc. [A. 58]

The TGB petitioned this Court for a writ of certiorari on March 13, 2000. The Solicitor General did not seek a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. THE QUESTION PRESENTED BY THE PETITIONER MISSTATES THE PARTIES AND THE SUBSTANTIVE ISSUES IN THE LAWSUIT.

Petitioner states the question presented as follows:

> "Whether an American Indian Tribe, having interest in the continuity of its Tribal Constitution, is a necessary party, pursuant to Fed. R. Civ. P. 19, in an action by private parties contesting the validity of the Tribe's Constitution?"

So framed, this question misstates the parties and the substantive issues.

Petitioner is not "the Tribe." It is the "Tribal Governing Board" [TGB] or tribal council. This distinction is profound. The LCO Constitution may be amended in one of two ways: *either* by resolution of the tribal council asking the Secretary of Interior to hold a federal election to amend the constitution, *or* by direct petition of the LCO People to the Secretary whereby the People bypass the tribal council. In this case, the *LCO Tribe, by its People directly*, petitioned the Secretary to hold the federal election to amend the constitution. The issue addressed by the lower courts was whether the bypassed TGB was necessary to the action brought by the Spokesperson for the Petitioners. Just like "Congress" is not "the United States," the TGB is not "the Tribe" in this context.[10]

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[10] The TGB frequently interchanges the two entities. For example, the TGB cites numerous cases which uphold a "Tribe's" right

The reference to plaintiffs being "private parties" is misleading. Sandy Thomas has the official role under the federal regulations as Spokesperson for the Petitioners who sought the election. She is not a disinterested private party somehow interfering in tribal affairs. The Seventh Circuit stated that "to the extent that anyone has a special legal status in regard to this election that should be taken into account, it is plaintiff Sandra Thomas." *Thomas*, 189 F.3d at 669. [A 11] The other plaintiffs are LCO People whose civil and human rights have been violated by the action taken by BIA officials. These claims are not those of private parties contesting the validity of the tribal constitution. Indeed, no one is contesting the validity of the LCO constitution, only the validity of the Secretary's disapproval of the election.

Plaintiffs sued the federal government for its alleged misdeeds in the conduct of a Secretarial election. Secretarial elections are federal elections – not tribal elections conducted by a tribe – for which the Secretary of Interior is procedurally and substantively responsible under the IRA, the APA, and the United States Constitutional protections that attach to such federal elections. 25 C.F.R. §81.2(s); RA 3. *Thomas v. U.S.*, 189 F. 3d 662, 667 (7th Cir. 1999); *Coyote Valley Band of Pomo Indians v. U.S.*, 639 F. Supp. 165,169-170 (E.D. Cal. 1986); *Cheyenne River Sioux Tribe v. Andrus*, 566 F.2d 1085, 1087-88 (8th Cir. 1977), *cert. den.* 439 U.S. 820 (1978); *Wounded Head v. Tribal Council of the Oglala Sioux Tribe*, 507 F. 2d 1079, 1084 (8th Cir. 1975); *Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt*, 107 F.3d 667 (8th Cir. 1997).

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to self-government and a "Tribe's" right to determine its own membership; they then substitute TGB for Tribe in their argument. [Pet. p. 7-10] Likewise, the petition refers to the Seventh Circuit having found that the "Tribe" is not a necessary party. The court found only that the TGB was not necessary. [See, e.g., Pet. p. 12-13, 19]

The federal defendants admit that Secretarial elections are federal not tribal elections. [R. 28, ¶15] "It is not merely the number or type of federal involvements which characterize these elections as federal...it is the source of the Secretary's regulatory authority over these elections, such authority having congressional and not tribal, origin. The Congress, not the Tribe, delegates to the Secretary the authority to call and conduct Secretarial elections.." *Cheyenne River Sioux Tribe*, 566 F.2d at 1088-1089. The federal regulations are based on this distinction. *See,* e.g., 25 C.F.R. §81.2(s); RA 3.

Federal defendants acknowledge the "U.S. Constitution protects the right of all qualified citizens to vote, in state as well as federal elections. Secretarial elections on the amendment of an IRA Constitution are federal elections." [R. 34, p. 11, citations omitted] The fact that the United States Constitution may not apply to tribal governments[11] "does not relieve State and Federal Governments of their obligations to individual Indians under these provisions." *Santa Clara Pueblo*, 436 U.S. 49, 56, n. 7 (1978). Even the TGB admits that the "IRA concerns Federal supervision of Secretarial elections and is not traditionally a subject of tribal law." [R. 62, p. 20]

Tribes conduct *tribal* elections under their own authority as quasi-sovereigns, e.g., to elect tribal representatives. These elections may be held pursuant to an IRA constitution. However, a *Secretarial election* conducted by the Secretary of

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[11] *Cf., In re Sah Quah,* 31 F. 327 (D. Alaska 1886)(Thirteenth Amendment applies, ending slavery among Tlingits of Alaska); "the principle sought to be attained by the amendment makes any other interpretation inconceivable." Cohen, Felix, Federal Handbook of Indian Law, 1982 Ed., p. 665.

Interior under the IRA is entirely different.[12]

In recognition of the United States' trust responsibility to Indian People, Congress adopted the IRA in 1934 and set up a structure by which Indian People could adopt "boiler plate" tribal constitutions to assist them in becoming self-governing once again.[13] Congress authorized the Secretary of Interior to call Secretarial elections to adopt or amend a tribal constitution

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[12]For example, the Twenty-Sixth Amendment applies to Secretarial elections, *Cheyenne River Sioux Tribe v. Andrus*, *supra*. However, it does not apply to "internal tribal elections." *Wounded Head v. Tribal Council of the Oglala Sioux Tribe*, *supra*. This is why *Wheeler v. Swimmer*, 835 F.2d 259 (10th Cir. 1987) is inapposite. It deals with the federal government's limited role in a tribal election in which tribal representatives are elected, not the extensive role of the federal government in a federal Secretarial election. Even *Thompson v. Area Director*, 17 IBIA 39, 45 (1989), cited by the Petitioner, distinguished tribal and "BIA" elections.

The arguments before this Court in *Rice v. Cayetano*, __ U.S. __, 120 S.Ct. 1044 (2000), apparently did not explore this distinction. This Court described elections under the IRA as "tribal elections established by the federal statutes" and stated that "[i]f a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi-sovereign. The OHA elections, by contrast, are the affair of the State of Hawaii." *Rice*, 120 S.Ct. At 1059. Tribal elections conducted pursuant to a tribal constitution adopted under the IRA are indeed the "internal affairs of a quasi-sovereign." Secretarial elections, however, are also affairs of the federal government, the performance of which fulfills its trust obligation to members of an Indian tribe. *Rice* noted that even if the Court found that Congress could treat Native Hawaiians as tribes, however, "Congress may not authorize ... a voting scheme of this sort." *Rice*, __ U.S. at __, 120 S.Ct. at 1058.

[13]Cohen, Felix, Handbook of Federal Indian Law, 1982 Ed., p. 149.

when a tribe made a request to do so. The Secretary adopted regulations to govern accepting requests from tribes, conducting elections, and approving or disapproving elections. 25 C.F.R. Parts 81 and 82. In 1988, Congress amended the IRA to impose strict time limits on the Secretary in carrying out the federal responsibilities under the act and to provide a cause of action to enforce the provisions of the IRA. [See, R. 21, p. 20-30]

In this action, Sandy Thomas invokes the federal statutory approval provision of the IRA to complete the petitioners' amendment process. Plaintiffs' action presumes the continuity and validity of the tribal constitution. The tribal constitution is affected by the lawsuit only to the extent it was affected in 1992 by the vote of the LCO People themselves.

By misstating the issue in the case as one challenging the validity of the tribal constitution, the TGB fails to inform the Court of plaintiffs' actual claims to which the TGB is asserting it is a necessary party. The question of necessity needs to be asked relative to the actual claims made, not the misstated issue presented in the Petition.

II. THERE IS NO REASON TO OVERTURN THE SEVENTH CIRCUIT.

The TGB asserts three reasons why this Court should grant its petition for certiorari. First, it asserts that the Seventh Circuit wrongly concluded that the TGB was not a necessary party because "the Tribe's constitutional membership criteria are at the heart of the controversy." [Pet. p. 5] The TGB argues that because the substance of one of the amendments voted on in the 1992 election dealt with redefining eligibility for tribal membership, and the Tribe has a right to determine its own membership, this translates into a need for the TGB to be a necessary party to the lawsuit. Second, the TGB asserts that the

Seventh Circuit decision conflicts with this Court's holding in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and the Eleventh Circuit decision in *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999). These cases discuss dismissal of a lawsuit when an indispensable party cannot be joined because of sovereign immunity. Third, the TGB asserts that the Seventh Circuit decision "interjects an additional criterion into the necessary party analysis that is not specified under Fed. R. Civ. P. 19" which conflicts with other circuit court decisions. None of these assertions is accurate.

There are significant issues in this case, the resolution of which may reverberate throughout the BIA and Indian Country:

> Can the BIA overturn a Secretarial election outside the 45-day time limit imposed by Congress in 25 U.S.C. § 476(d)(1)?
>
> Can the BIA *sua sponte* impose a race-based blood quantum requirement on LCO members voting in federal Secretarial elections (i.e., decide *who among LCO's members* may vote based on their blood quantum), given the language in the IRA and the Fifteenth Amendment to the contrary?
>
> Can the BIA be held accountable for violating its trust responsibility to LCO People for its alleged misdeeds in connection with overturning the election?[14]

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[14]For example, Secretary of Interior's *ex parte* contacts betray the public trust, taint the subsequent decision and violate basic fiduciary duties owed to Indian People. *Navajo Nation v. U.S.*, __ Fed. Cl. __, 2000 WL 141233 (Fed. Cl. 2/4/00).

Can BIA officials be held accountable for overturning the election and disenfranchising members without statutory authority?

These are questions of federal law which the parties extensively briefed years ago on cross motions for summary judgment. Other than the 45-day issue, however, no lower court has addressed these questions after four years of litigation.

A. The Substance of the Amendments Ratified by the LCO People in the 1992 Election is Not the Issue of the Lawsuit.

The LCO People voted in favor of two proposed amendments in 1992. For purposes of plaintiffs' action, it does not matter what the substance of those amendments was.[15] Plaintiffs would raise the same issues regardless of the substance of the amendments: the BIA could not do what it did, when it did it, and for the reasons it did. The BIA could not overturn the approval of the election months after the 45-day time limit to review the election had expired, establish a new race-based blood quantum criterion for voting, or disenfranchise hundreds of adult LCO tribal members.

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[15]The TGB "jumps the gun" on the issue of relief by asserting that complete relief cannot be granted in this case against the federal government because the substance of one of the amendments directs the TGB to take specific action upon approval of the amendment. Complete relief against the BIA can be granted in this case, i.e., statutory approval of the amendments ratified by the LCO People, and reinstatement of members' federal voting rights. The Seventh Circuit pointed out that if the TGB then chooses to disobey the amendments, the plaintiffs or other LCO members may bring an action against the TGB. This is speculative, however, because it presumes future illegal activity.

One of the petitions accepted by the BIA in 1991 indeed was the committees' proposed amendment to the criteria for tribal membership eligibility. Plaintiffs agree *Tribes* have the right to determine their own membership, that Indian self-determination includes the right to define the conditions of membership, and that these are core tenets of Indian law.[16] [See, e.g., Pet. pp. 6-8] Plaintiffs, as members of a federally

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[16]A Tribe has a right to determine its membership using blood quantums, or other more relevant cultural criteria. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The federal government may rely on these membership determinations when they are blood quantum-based because the federal deference is granted to the political status of the members of the quasi-sovereign tribe, not to "Indians [] as a discrete racial group." *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

When a tribe has determined its membership and guarantees its members equal political rights, however, it does not follow from *Santa Clara Pueblo* or *Mancari* that the BIA can pick and choose among the tribe's members who can vote in federal Secretarial elections based on their blood quantum. The leeway allowed in *Mancari* to the BIA to maintain a hiring preference for tribal members does not extend to a new and larger dimension of allowing the BIA to separate the tribe's members into different classes of "Indians" based on their blood quantum for voting purposes. Courts have not allowed the BIA to do this in other contexts. *See*, e.g., *Zarr v. Barlow*, 800 F.2d 1484, 1494 (9th Cir. 1986)(the IRA does not authorize the BIA to make distinctions among Indian tribal members because of differing amounts of Indian blood for purposes of higher education grants).

The political distinction under *Mancari* is based on tribal membership. When the BIA attempts *sua sponte* to add a blood quantum requirement to members' voting rights, the governmental deference to tribal members loses its political aspect and indeed becomes a classification based solely on race, i.e., a race-based voter qualification. The Fifteenth Amendment prevents the federal government's use of such racial classifications in federal elections. *Rice v. Cayetano*, __ U.S. __, 120 S.Ct. 1044 (2000).

recognized Indian tribe, are keenly aware of and interested in preserving their rights to self-determination and self-government. Plaintiffs have never challenged the cases cited by the TGB that hold that a Tribe has a right to determine its own membership. The Seventh Circuit decision did not violate any of these underpinnings of Indian law.

In this case, the *LCO Tribe, by the LCO People directly,* exercised its sovereign right to self-determination by voting directly on the proposed amendments to the tribal constitution. The *LCO Tribe, by the LCO People directly,* exercised sovereignty and determined the criteria for tribal membership. This lawsuit only seeks to complete the federal amendment process. The suit enforcing the federal election procedures does not undermine the "centrality" of tribal government. It merely enforces the changes voted upon by the LCO People.[17]

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[17]Though the Seventh Circuit noted that some have questioned the need for federal control over the tribal constitutional process, the TGB's actions show there is wisdom in Congress' balanced approach in the IRA. (*Thomas*, at 667, citing Joranko and Van Norman, Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments, 29 Gonz. L. Rev. 81 (1993/94).) For example, assuming an entirely benevolent tribal government, Indian People still may want a separation of governmental powers so that all of the power is not concentrated in one entity, or they may want to provide for checks and balances in the government by creating an independent tribal court -- substantial changes which tribal government officials might oppose because they do not want to lose power. Under the federal structure in place, the People still can petition for proposed amendments directly to the BIA and bypass the tribal council because of their perceived or actual opposition to the substance of the amendments. The People can ratify the amendments in a federal Secretarial election and obtain their preferred form of self-government, despite opposition from rich or powerful tribal government officials. Because of the federal nature of the election, the tribal officials are not able to prevent implementation of the amendments.

The LCO People expect and deserve a fair and impartial federal approval process to protect their ability to self-govern within the government they have constructed under the IRA, especially when the changes they seek may be divisive in their small communities or are opposed by powerful tribal officials.[18] The need to ensure an independent and fair federal amendment process is primary, regardless of the substance of the amendments. The fact that one of the amendments ratified by the LCO People in this case deals with membership eligibility is significant, but it is not critical to the plaintiffs' claims.

B. The Seventh Circuit Decision Does Not Conflict with Current Law.

The TGB asserts that the Seventh Circuit decision conflicts with current law regarding tribal sovereign immunity. However, the Seventh Circuit found that the TGB was not a necessary party. It never addressed the issue of Congressional abrogation of tribal immunity or the absence of immunity under *Ex parte Young*. The decision therefore does not conflict with current law on the issue of immunity. Furthermore, the TGB's substantive arguments on the issue are misguided.

The TGB argues that the Seventh Circuit decision conflicts with this Court's holding in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and the Eleventh Circuit's decision in *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999). In *Seminole*, this Court held that the Indian

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[18]Matheson recognized that federal Secretarial approval of membership ordinances and Secretarial review of the membership process are mandatory because a tribal council "may exact revenge on members with opposing viewpoints through the termination of membership....Hence, the Secretary could not approve an amendment which eliminated Secretarial approval." [A. 72]

Commerce Clause does not authorize Congress to abrogate the sovereign immunity of states reserved under the Eleventh Amendment. In particular, *Seminole* held that Congress had no authority to abrogate states' sovereign immunity in a provision of the Indian Gaming Regulatory Act [IGRA] which allowed tribes to sue states for allegedly failing to negotiate a gaming compact in good faith. *Seminole*, 517 U.S. at 47.

In *Seminole*, the issue was whether Congress had the power to abrogate states' immunity unilaterally. Unlike *Seminole*, Congress does have authority to abrogate the sovereign immunity of Indian tribes. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). To the extent that tribal councils must be joined to complete the federal amendment process, Congress abrogated immunity with respect to actions to enforce approval of amendments ratified by tribal members in a Secretarial election in 25 U.S.C. §476(d)(2) just as expressly as the *Santa Clara Pueblo* Court found in the Indian Civil Rights Act with respect to habeas corpus actions. [25 U.S.C. §1303: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. §476(d)(2): "Actions to enforce the provisions of this section may be brought in the appropriate Federal district court."] The *Seminole* case is thus inapposite.

Similarly, the Eleventh Circuit decision in *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999), is inapplicable.[19] The Eleventh Circuit held that IGRA did not abrogate the Seminole Tribe's immunity to an action by Florida

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[19]The Eleventh Circuit noted that some of the confusion in this area stems from the language in the *Santa Clara Pueblo* decision itself, confusing tribal waivers of immunity with Congressional abrogation of immunity. *Florida v. Seminole Tribe of Florida*, 181 F.3d at 1241, n. 5.

to enjoin gaming without a compact because IGRA only abrogated tribal immunity for suits alleging violations of a valid compact. *Florida*, 181 F. 3d at 1242. The TGB's reliance on this case is belied by the actual language of the IRA: here Congress specifically provided the federal forum to enforce the federal Secretarial election process.

This is not a case where Congress has no authority to abrogate sovereign immunity because of the Eleventh Amendment, nor even where immunity has not been abrogated by Congress. If the TGB had been found necessary, then the court could have joined them and their members and the action proceeded. Neither *Seminole* nor *Florida* applies to this case. The TGB's argument fails for a still more basic reason.

The LCO People are the sovereigns. Ultimate sovereignty rests with and is vested in the People themselves. *See*, e.g., *McCulloch v. Maryland*, 17 U.S. (Wheat.) 316, 403-407 (1816). Tribal officials, though they may exercise powers delegated from the People while in office, remain servants of the People. When a Tribe seeks to amend its constitution under the IRA by direct petition of the People, and the Spokesperson for the Petitioners brings an action to enforce the vote of the People, the TGB cannot wrest further sovereignty from the People to frustrate the People's right to amend their own constitution. That is what the TGB is attempting to do and that is anathema to self-determination.

C. The Seventh Circuit Did Not Impose an Additional Criterion into the Rule 19 Analysis; Rather, it Simply Rebuked the TGB for its Actions Outside the Federal Law.

The TGB asserts that the Seventh Circuit decision, unlike other circuit court decisions interpreting Rule 19,

"interjects an additional criterion" into the necessary party analysis that is not required under Rule 19.[20] The TGB misunderstands the Seventh Circuit's admonition.

The Seventh Circuit stated the TGB had options available in 1992 if they disagreed with the Secretary's approval of the election.[21] Members of the TGB could have brought an action to test the approval by the Secretary under the IRA if they believed the Secretary's approval was in error. Or, if the TGB believed it was "stuck with an illegitimate constitution" after the Secretary's approval of the election, it could have asked the BIA to hold a Secretarial election to revoke the constitution. The statutes and rules prescribed exactly how the TGB could obtain such relief. *Thomas*, at 669. E.g., 25 C.F.R. §81.5(a). The Seventh Circuit observed that the TGB never attempted these options and never challenged the election by the "prescribed statutory procedures." It called the actions of Gaiashkibos "less than orthodox." *Thomas*, at 665, 668.

The Seventh Circuit was not imposing an additional criterion into the Rule 19 analysis. It only stated its awareness that the TGB's strategy was to prevent review of its ill-gotten agency decision by claiming that no action to review the agency decision could proceed without it. The Court pointedly identified this as the TGB's "ploy" which it would not condone, i.e., "to leverage its failure to follow prescribed statutory procedures into an unreviewable decision to disapprove the election, by taking advantage of Rule 19." *Thomas*, at 669.

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[20]Pet. p. 22, n. 21.

[21]Petitioner argues that they disagreed with the Matheson decision, Pet. p. 16; but, *cf.* p. 23 where Petitioner argues that Gaiashkibos was "successful" with the Matheson decision.

The Seventh Circuit correctly followed the necessary party analysis under Rule 19, and its decision is consistent with *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558-59 (9th Cir. 1990)(there generally is no legally protected interest in particular agency procedures and absent parties are not necessary if they have an equal interest in a federal administrative process that is lawful). The Seventh Circuit's reproof to the TGB came after the court's analysis of whether the TGB was a necessary party. The analysis did not hinge on these observations. There is no "additional criterion" to the Rule 19 analysis that conflicts with other circuits, and no reason exists to overturn the Seventh Circuit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated this 12th day of May 2000.

Respectfully submitted,

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APPENDIX
TO RESPONDENTS' BRIEF IN OPPOSITION

Relevant Portions of Applicable Federal Laws

25 U.S.C. §476

Organization of Indian tribes; constitution and bylaws and amendment thereof; special election

(a) Adoption; effective date.

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when--

(1) ratified by a majority of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

(b) Revocation

Any constitution or bylaws ratified and approved by the Secretary shall be revocable by an election open to the same voters and conducted in the same manner as provided in subsection (a) of this section for the adoption of a constitution or bylaws.

(c) Election procedure; technical assistance; review of proposals; notification of contrary-to-applicable law findings

(1) The Secretary shall call and hold an election as required by subsection (a) of this section--

(A) within one hundred and eighty days after the receipt of a tribal request for an election to ratify a proposed constitution and bylaws, or to revoke such constitution and bylaws; or

(B) within ninety days after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws.

(2) During the time periods established by paragraph (1), the Secretary shall--

(A) provide such technical advice and assistance as may be requested by the tribe or as the Secretary determines may be needed; and

(B) review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws.

(3) After the review provided in paragraph (2) and at least thirty days prior to the calling of the election, the Secretary shall notify the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.

(d) Approval or disapproval by Secretary; enforcement

(1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution, and bylaws or any amendments are contrary to applicable laws.

(2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.

* * *

25 C.F.R. § 81.2(s). *Secretarial election* means an election held within a tribe pursuant to regulations prescribed by the Secretary as authorized by Federal Statute (as distinguished from *tribal* elections which are conducted under tribal authority. (See *Cheyenne River Sioux Tribe v. Andrus*, 566 F. 2d 1085 (8th Cir. 1977), *cert. den.* 439 U.S. 820 (1978)). [Emphasis in original.]

25 C.F.R. § 81.5(a). The Secretary shall authorize the calling of an election to adopt a constitution and bylaws or to revoke a constitution and bylaws, upon a request from the tribal government.

(b) The Secretary shall authorize the calling of an election to adopt a constitution and bylaws pursuant to a Federal Statute upon receipt of a petition bearing the signatures of at least 60 percent of the tribe's adult members.

(d) The Secretary shall authorize the calling of an election on the adoption of amendments to a constitution and bylaws or a charter when requested pursuant to the amendment article of those documents. The election shall be conducted as prescribed in this part unless the amendment article of the constitution and bylaws or the charter provides otherwise, in which case the provisions of those documents shall rule where applicable.

25 C.F.R. § 82.1(o). *Spokesman for the petitioners* means the authorized voter of a tribe initiating a petition or designated by the initiators of a petition to speak on their behalf.

5 U.S.C. §706 Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be–

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedures required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

42 U.S.C. §1985(3) Conspiracy to interfere with civil rights
If two or more persons in any State or Territory conspire, ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; ...; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

United States Constitution

Fifth Amendment. No person shall ..... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Ninth Amendment. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Fifteenth Amendment. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Twenty-Sixth Amendment. Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or any State on account of age.

Supreme Court, U.S.
FILED
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(3)

No. 99-1520

In the Supreme Court of the United States

TRIBAL GOVERNING BOARD OF THE LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, PETITIONER

v.

SANDRA THOMAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a Tribe's governing body is a necessary party to a suit by a voter challenging the Secretary of the Interior's decision under 25 U.S.C. 461 to nullify the results of an election ratifying amendments to the Tribe's constitution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 189 F.3d 662. The opinion of the district court (Pet. App. A17-A37) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1999. A petition for rehearing was denied on December 13, 1999 (Pet. App. A58). The petition for a writ of certiorari was filed on March 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Indian Reorganization Act (IRA) authorizes any Indian Tribe to "adopt an appropriate constitution" through "a special election authorized and called by the Secretary [of the Interior] under such rules and regulations as the Secretary may prescribe." 25 U.S.C. 476(a) and (a)(1). A Tribe's constitution becomes effective upon the Secretary's approval. 25 U.S.C. 476(a)(2) and (d). The IRA also authorizes the Secretary to conduct elections to ratify amendments to tribal constitutions and to approve the results of those elections. 25 U.S.C. 476(c)(1)(B) and (2)(B), 476(d). The IRA provides that the Secretary shall approve a constitution or an amendment within 45 days after the election unless he finds that the constitution or amendments are contrary to applicable law. 25 U.S.C. 476(d)(1).

If the Secretary receives a valid request to hold an amendment ratification election, and the Secretary determines that the proposed amendments are legal, the Secretary must call an election within 90 days. 25 U.S.C. 476(c)(1)(B); 25 C.F.R. 81.5(d). To become effective, election results must receive the Secretary's approval. Any qualified voter may contest the results to the Secretary within three days of the election. 25 C.F.R. 81.22. The Secretary has 45 days to review such election challenges and to decide whether to approve the election results. 25 U.S.C. 476(d)(1). IRA affords a private right of action to enforce its provisions in federal district court. 25 U.S.C. 476(d)(2).

2. Respondent Sandra Thomas is a member of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians (the Tribe). Pet. App. A2. Thomas served as chairperson of a committee to draft proposals to amend the Tribe's constitution. *Ibid.* The committee eventu-

ally adopted four proposals and submitted them to the Bureau of Indian Affairs (BIA) in the Department of the Interior. *Id.* at A2-A3. The BIA called for an election on two of those proposals – Proposed Amendments A and B. *Id.* at A3. Proposed Amendment A redefines tribal membership in terms of lineal descendancy rather than blood quantum. *Ibid.* Proposed Amendment B lengthens the term of office for elected tribal officials. *Ibid.*

The BIA conducted an election on the two proposals. Pet. App. A3. Both proposed amendments received a majority of the votes cast. *Ibid.* Several tribal members, including the Chairman of the Tribe's governing board, contested the election results. *Ibid.* The BIA rejected the challenges and formally approved the amendments to the Tribe's constitution. *Ibid.*

The Chairman of the Tribe's governing board sought further review of that decision. Pet. App. A4. In response, the BIA revoked its approval of the election results. *Ibid.* The BIA concluded that elections to ratify constitutional amendments must be open to the same class of voters who were entitled to vote in the election adopting the constitution, and that a significant percentage of those voting on Amendments A and B did not meet the voting criteria for the original constitutional election. *Ibid.* The BIA stated that it intended to conduct a new election on the proposed amendments. *Ibid.*

3. Respondent Thomas and others (respondents) filed suit against the Department of the Interior, the Secretary of the Interior, and several other federal officials (federal respondents), challenging the BIA's disapproval of the election results. Respondents alleged that (1) the BIA's disapproval exceeded the 45-day period allowed for such action; (2) the BIA's action

was arbitrary and capricious under the Administrative Procedure Act (APA), 5 U.S.C. 706(2); and (3) the BIA violated the federal government's trust responsibility to the Tribe. Pet. App. A5. The federal respondents moved to dismiss on the ground that the Tribe's governing board (petitioner) is a necessary and indispensable party to the action within the meaning of Federal Rule of Civil Procedure 19. *Ibid.*

The district court initially denied the motion to dismiss. Pet. App. A38-A57. The court concluded that petitioner is a necessary party under Rule 19. *Id.* at A54-A55. The court reasoned that the "proposed amendments deal with matters of fundamental importance to the tribe," *id.* at A53; that if respondents prevailed," the BIA could be exposed to additional litigation" initiated by petitioner, *id.* at A53-A54; and that "even if the BIA decision is reversed and the 1992 results are reinstated, [petitioner] may frustrate efforts to enforce the amendments," *id.* at A54. The court declined to dismiss the action, however, on the ground that petitioner might join the action voluntarily or waive its immunity if joined by respondents. *Id.* at A55-A56.

Petitioner declined to become a party. Pet. App. A5. Respondents then amended their complaint to name petitioner as a defendant. *Id.* at A6. Petitioner and the federal respondents moved to dismiss, and the court granted the motions. *Id.* at A17-A37. The district court held that claims against petitioner were barred by tribal sovereign immunity. *Id.* at A26-A27. The court dismissed the claims against the federal respondents for failure to join a "necessary" and "indispensable" party under Rule 19. *Id.* at A28-A31.

4. The court of appeals reversed, holding that petitioner is not a "necessary" party under Rule 19(a). Pet.

App. A1-A13. While the court accepted the district court's finding that petitioner has a strong interest in the subject matter of the litigation, it concluded that "the fact that a tribe has an interest in the litigation is not enough in itself to make it a necessary party in the sense of Rule 19." *Id.* at A9. Noting that "the IRA explicitly reserves to the federal government the power to hold and approve the elections that adopt or alter tribal constitutions," *id.* at A8, and that Congress had "refused to reflect the tribal interest in the legal structure of tribal constitutional elections," *id.* at A10, the court of appeals concluded that "the district court erred in finding the governing board had to be included in the lawsuit based on the depth of the tribe's interest in the matters addressed in the Secretarial election," *ibid.*

The court also was not persuaded "that there is a legally cognizable risk of incomplete relief." Pet. App. A10. The court reasoned that "the tribal governing board has no legal authority to refuse to implement amendments to the tribal constitution that have been put to a vote and approved by the Secretary." *Ibid.*

The court of appeals also rejected the argument that the threat of future litigation by petitioner against the BIA was sufficient to make petitioner a "necessary" party. Pet. App. A10-A11. The court reasoned that such a conclusion "would be tantamount to holding that all voters [in elections to ratify tribal constitutions] are necessary parties," because all such voters would "have the same standing to sue and might some day exercise it." *Id.* at A11. Finally, the court noted that its decision leaves petitioner free to protect its interest in litigation through intervention or participation as amicus curiae, and at the same time "does not slam the courthouse door in the face" of those "who seek only to invoke the

judicial oversight of the Secretary's actions provided for in 25 U.S.C. § 476(d)(2)." *Id.* at A12.

ARGUMENT

Petitioner contends (Pet. 5-24) that a Tribe's governing body is a necessary party to a suit by a voter challenging a decision by the Secretary of the Interior to disapprove the results of an election ratifying amendments to a tribal constitution. The court below, however, is the first court of appeals to issue a published decision on that question. Moreover, the court's Rule 19 decision turns on its assessment of the specific statutory scheme at issue; it does not raise any more general issue under Federal Rule of Civil Procedure 19. Review by this Court is therefore not warranted.*

1. a. Petitioner first contends (Pet. 7-13) that the court of appeals' decision conflicts with decisions of this Court holding that Tribes retain their powers of self-government except to the extent that they have been limited by Congress. The court of appeals, however, recognized that Tribes retain their powers of self-government except to the extent that they are limited by Congress. Applying that principle, the court concluded that the specific statutory scheme at issue significantly limits the powers of an IRA Tribe over the process for

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* The district court dismissed the claims against petitioner on sovereign immunity grounds, Pet. App. A26-A27, and then dismissed the claims against the federal respondents on the ground that the Tribe was an indispensable party that could not be joined, *id.* at A28-A31. Although the court of appeals reversed the latter holding, it did not reverse the former. There accordingly is some question whether petitioner, which of course does not challenge the ruling that it is protected by sovereign immunity, is a "party" that may invoke the Court's certiorari jurisdiction under 28 U.S.C. 1254(1).

amending tribal constitutions. Pet. App. A8-A10. In particular, the court noted that the IRA gives the Secretary of the Interior the power to hold and approve the elections that alter IRA tribal constitutions, *id.* at A8, that Congress had rejected a recommendation to give Tribes the authority to decide election challenges, *id.* at A9, and that Congress gave individual voters a statutory right to seek judicial review of the Secretary's election disapproval decisions, *id.* at A12.

Those considerations based on the IRA itself, and not the court's failure to apply the background principle that a Tribe retains its powers of self-government in the absence of limitation by Congress, led the court to conclude that petitioner does not have the kind of interest that would make it a necessary party to the present litigation. Petitioner's first contention therefore does not warrant review.

b. Petitioner next contends (Pet. 15-16) that the United States has a conflict of interest that disables it from adequately representing petitioner's interest. The court of appeals, however, did not hold that the United States could adequately represent petitioner's interest in the litigation. Instead, as discussed above, it held that petitioner does not have the kind of interest in the present litigation that would make it a necessary party in the first place. Pet. App. A8-A10. The question whether the United States can adequately represent petitioner's interest is therefore not properly presented here.

Even if the question were properly presented, however, it would not warrant review. In support of its contention that the United States has a disabling conflict, petitioner argues (Pet. 16) that respondents sought money damages against both petitioner and the federal respondents, and that the United States has a

different view from petitioner on the meaning of certain provisions of the Tribe's constitution. Respondents, however, have waived their money damages claims. Pet. App. A5, A12. Moreover, respondents' complaint does not raise any issue concerning how the Tribe's constitution should be interpreted. The circumstances identified by petitioner therefore do not suggest that the United States has a conflict of interest that would disable it from adequately representing petitioner's interest in this case. In any event, the question whether those circumstances give rise to a conflict of interest is fact-bound; it does not raise any issue of general importance warranting this Court's review.

c. Petitioner also contends (Pet. 17-18) that it is a necessary party because, in its absence, complete relief cannot be afforded among the existing parties. In particular, it contends that the constitutional amendments at issue direct petitioner to enact an ordinance implementing the amendments, and that, if respondents prevail in the present litigation, petitioner might adopt an ordinance that respondents find unsatisfactory. Respondents, however, have not sought in the present litigation to affect whatever discretion petitioner might have in implementing the constitutional amendments. Instead, they have sought only to invalidate the Secretary's disapproval of Proposed Amendments A and B and to restore the legal validity of those amendments. Pet. App. A4-A5. The possibility that petitioner might implement the constitutional amendments in a way that respondents find unsatisfactory therefore does not affect a court's ability to award complete relief in the present case should it rule in respondents' favor.

In any event, petitioner's complete relief argument, like its conflict-of-interest argument, affects only the parties to the present litigation. It does not raise any

issue of general importance warranting this Court's review.

2. Petitioner also errs in contending (Pet. 18-21) that the court of appeals' decision conflicts with *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and *Florida* v. *Seminole Tribe*, 181 F.3d 1237 (11th Cir. 1999). In the first of those decisions, this Court held that Congress does not have power under the Indian Commerce Clause to abrogate a State's sovereign immunity from suit under the Eleventh Amendment. It therefore held that the Seminole Tribe was barred from suing the State of Florida to enforce the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.* In *Florida* v. *Seminole Tribe*, *supra*, the Eleventh Circuit held that an action brought by the State against the Tribe to enforce provisions of IGRA was barred by tribal sovereign immunity. Neither case involved any question concerning the statutory scheme at issue here or Rule 19. There is therefore no conflict between the decision below and those decisions.

3. Finally, petitioner contends (Pet. 22-24) that the court of appeals erred in holding that, in order to be considered a necessary party, a Tribe must first pursue its own legal remedies against the Secretary. The court of appeals, however, did not impose any such requirement. Before observing that petitioner had failed to exercise its statutory right to challenge the Secretary's initial approval of the constitutional amendments, the court first decided on other grounds that petitioner is not a necessary party to the present litigation. Pet. App. A8-A11. The court then concluded that petitioner should not be able to use its failure to follow the prescribed statutory procedures for challenging the Secretary's approval of the amendments as a basis for creating an interest that would give it necessary party

status. *Id.* at A11-A12. That unremarkable conclusion does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2000

Supreme Court, U.S.
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(4)

No. 99-1520

In the
Supreme Court of the United States

TRIBAL GOVERNING BOARD OF THE LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS,

Petitioner,

vs.

SANDRA THOMAS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF TO BRIEFS IN OPPOSITION

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QUESTION PRESENTED

Whether an American Indian Tribe, having interest in the continuity of its Tribal Constitution, is a necessary party, pursuant to Fed. R. Civ. P. 19, in an action by private parties contesting the validity of the Tribe's Constitution?

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I. AS THE TRIBE'S CONSTITUTIONALLY ELECTED GOVERNMENTAL BODY, THE LAC COURTE OREILLES TRIBAL GOVERNING BOARD IS A NECESSARY PARTY.

A. Core Principles of Federal Indian Law Affirm the TGB's Constitutional Obligation to Protect the Interests of the Tribe and its Members.

Plaintiffs Sandra Thomas et al. (hereinafter "Plaintiffs") argue not only that the Tribal Governing Board ("TGB") is not a necessary party, but that it has no interest in the present litigation because the only party with any interest is the Lac Courte Oreilles Band of Lake Superior Chippewa Indians ("LCO" or "Tribe") *"by the LCO people directly."* Brief of Respondents Sandra Thomas, et al. in Opposition (Plaintiffs' Br.) at 17-21, 25-26. They also dismiss any interest of the TGB by arguing that provisions of the Tribe's Constitution are not at issue because *"the LCO people"* have voted. Id. at 13. However, Plaintiffs forget this litigation presents a legitimate question as to whether the proper people voted. On October 7, 1992, the Department of the Interior, through then-Acting Assistant Secretary for Indian Affairs, David Matheson, ("Assistant Secretary") found the election to be invalid because the proper people did not vote. Pet. 3, A-69-70.[1]

The TGB has the responsibility of representing the day-to-day interests of the Tribe under its Constitution.[2] The role of membership is primarily that of electing the TGB and voting at elections concerning constitutional amendments or referendums.[3]

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[1] Plaintiffs' argument to dismiss the action of then-Assistant Secretary Matheson is, in part, based on their conclusion that blood quantum membership provisions are racist, unacceptable and cannot be considered. See Plaintiffs' Br. at 22-24. Thus, Plaintiffs' argument rests on the principle that the Constitution, as adopted by the Tribe, and approved by the Secretary of the Interior, is per se illegal and unenforceable. Plaintiffs' assertion that "no one is contesting the validity of the LCO constitution, . . ." is disingenuous, at best. Further, Plaintiffs argue that the TGB should not be able to argue the Tribe's Constitution because they did not mention it in their Complaint. If that were true, constitutional protections would mean nothing.

[2] The Tribe's Bylaws provide at Article I, Section 4(Board Members): "It shall be the duty of the Board members to promote the general welfare to the Band and carry out the provisions and purposes of this Constitution and Bylaws.

[3] Article IV of the Tribe's Constitution governs elections. Pet. A-77 – 78.

The position of the LCO TGB is that the proper people did not vote. If, indeed, there is a prima facie case that the proper people did not vote, the issue cannot be circumvented by rhetoric.

The Federal Respondents, on the other hand, acknowledge, in their reframing of the question,[4] that the election at issue involves ratifying amendments to the Tribe's constitution. Brief of Federal Respondents in Opposition (Fed. Respondents Br.) at I. It would seem beyond dispute that such an election impacts Tribal interests. The amendments at issue purport to change both the definition of tribal membership and the length of the terms of TGB members. Yet, it is the revised and current position of the United States,[5] as well as that of Plaintiffs,[6] that the TGB does not have the type of interest that would make it a necessary party to the present litigation.[7] Well established principles of Federal Indian law are to the contrary.

A tribe has the power "to determine and define its own form of government." Felix Cohen, Handbook of Federal Indian Law, Chap. 7, § 3, p. 126 (1942). This power is "[t]he first element of sovereignty, and the last which may survive successive statutory

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[4] Federal Respondents state the question presented as follows: "Whether a Tribe's governing body is a necessary party to a suit by a voter challenging the Secretary of the Interior's decision under 25 U.S.C. 416 (sic) to nullify the results of an election ratifying amendments to the Tribe's constitution."

[5] The arguments presented by the Federal Respondents in their brief, dated August 31, 1998, submitted to the United States Court of Appeals for the Seventh Circuit in this matter were diametrically opposed to their current position. See Appendix herein at B-9 - B-17. Therein, the Federal Respondents argued that the District Court properly determined that the TGB is not only a necessary party, but an indispensable party. Id.

[6] Both parties direct considerable attention to restating factual specifics. The Petitioner does not necessarily agree with these presentations in all respects. However, the factual circumstances giving rise to the Petition for Certiorari are specified within Petitioner's original Statement of the Case. Pet. 2-5.

[7] Contrary to the Federal Respondents' assertion that there is some question whether the TGB may properly invoke this Court's certiorari jurisdiction under 28 U.S.C. 1254(1) (Fed. Respondents' Br. at 6 note at asterisk), the Seventh Circuit essentially determined the TGB did have an interest, but that said interest did not convey necessary party status. The Court of Appeals, however, stated there were several manners in which the TGB could participate, i.e., a petition to intervene or as *amicus curiae*. It would be rather contradictory to view the TGB as not having the necessary status to seek certiorari.

limitations of Indian tribal power." Id. LCO adopted a constitutional form of government, organized under provisions of the Indian Reorganization Act of 1934, 25 U.S.C. 461 et seq. ("IRA"). Although Congress expressly sanctioned the exercise of tribal powers under IRA constitutions, the tribes adopting such continue to exercise their unextinguished powers of sovereignty, which predate the United States Constitution.[8] Thus, the IRA "had little or no effect upon the substantive powers of tribal self-government vested in the various Indian tribes. . ." Cohen, supra, Chap. 7, § 3 at 128.

In exercising their unextinguished powers of tribal self-government, Tribal membership, in adopting the LCO Constitution, have prescribed the TGB as the authoritative organ of government through which tribal acts are given the character and authority of group action. Indeed, the Tribe's Constitution provides at Article III, Section I that "[t]he governing body of the Band shall be the Governing Board composed of seven (7) members." Accordingly, the TGB is directly responsible for serving and protecting the interests of the Tribe and its members.

Despite the clear constitutional charter given the TGB as the elected governing body of the Tribe, the Federal Respondents and the Plaintiffs (collectively hereinafter, unless further qualified, "Respondents") assert that Tribal Government has no voice where Secretarial Elections are concerned. Respondents, however, leave a void by presuming that the election was correct, and that the TGB steps out of bounds if it challenges the procedure. In fact, a Secretarial Election cannot be presumed to be conducted properly. Regulations for conducting Secretarial Elections are provided at 25 C.F.R. Part 81. Further, the TGB is responsible as the duly elected governmental body, to ensure the integrity of proper conduct of all affairs involving the Tribe, including elections that may change the Tribe's Constitution. Membership here achieves expression through the TGB.

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[8] Felix Cohen, Handbook of Federal Indian Law, Ch. 4, § C1, p. 247-48 (1982 ed.), citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 n.22 (1978) (the court spoke only of inherent, not delegated, tribal powers when the tribe had adopted a constitution under the Indian Reorganization Act); see also Talton v. Mayes, 163 U.S. 376 (1896).

B. The Statutory Scheme at Issue Recognizes the Integral Role of Tribal Government in a Secretarial Election.

If Secretarial Elections are not conducted properly, it is well within the role of the TGB to question the procedure. In this case, the TGB clearly did not make a spurious claim. The Assistant Secretary, in accordance with the Department's trust responsibility to the Tribe, questioned the Secretarial Election and declared the process invalid because the proper class of voters did not vote. Plaintiffs argue that the TGB has been "bypassed" entirely by "*the LCO people directly*" (Plaintiffs' Br. 17, 25) in this matter and, thus, cannot respond as a necessary party arguing the correctness of the actions of the Assistant Secretary, when the Plaintiff's joined the TGB to their lawsuit. Of course, such a result undermines the role of tribal government. It defies common sense to suggest that an election challenge would more properly be made by several thousand tribal members collectively making submittals.

An election occurs as a one-time event. The TGB would be neglecting its constitutional responsibility by remaining silent when it suspects proper election procedures have not been followed where the large majority of those voting were ineligible. Further, this is well understood within the federal regulations promulgated pursuant to 25 U.S.C. § 476(a)(1)[9] regarding the basic procedures for proposing constitutional amendments. As the regulations governing Secretarial Elections provide, amendment proposals may be initiated by a Tribe's governing body, or by a Tribe's membership via a petition. See 25 C.F.R. § 81.5. Additionally, 25 C.F.R. § 81.8 provides for an election board, including "at least two representatives of the tribal governing body or an authorized representative committee . . ." to conduct elections. Thus, the very

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[9] The procedures for calling and approving an election to amend a tribal constitution are codified in the IRA at 25 U.S.C. § 476. Pet. A-3. The requirements of the Secretary of the Interior's elections regulations are found at 25 C.F.R. § 81. Pet. A-61. These federal regulations are promulgated pursuant to 25 U.S.C. § 476(a)(1) which authorizes the Secretary to prescribe them. See Pet. A-61; see also Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt, 906 F. Supp. 513, 516 (D. Minn. 1995) (holding that the forty-five day time limit contained in 25 U.S.C. § 476(d)(2) is not triggered until the threshold requirement in § 476(a)(1) is satisfied; i.e., amendments to a Tribal Constitution must be ratified under the Secretary's rules).

regulations establishing procedures for administering the election clearly recognize the central role of the Tribe's governing body in the process, which is precisely what the proper application of the necessary party analysis should reflect. Respondents' assertions that the statutes and regulations at issue somehow mandate the absence of Tribal government in the Secretarial Election process stand in stark contrast to the foregoing provisions.

Plaintiffs' "power to the people" argument associated with the submittal of a petition (see Plaintiffs' Br. 17, 25, 28) attempts to extend the acknowledged right--of tribal members (as appropriately defined) to vote in a Secretarial Election--to a mandate that tribal government has no role in voicing criticism of the manner in which such an election is conducted. However, the regulations at 25 C.F.R. Part 82 also recognize the central role of Tribal Government in the amendment proposal process, stating at 25 C.F.R. § 82.5 that the numerical sufficiency of any petition is to be determined through "consultation with the tribal governing body."

Further, the foregoing regulations also comport with the purpose of the IRA, under which the Tribe organized and adopted its Constitution. The purpose of the IRA was to revitalize the status and authority of tribal governing bodies.[10] Indeed, the major thrust of the Act was "to minimize the enormous discretion and power exercised by the Department of the Interior . . .," with "[t]he focus of power" being "decentralized and moved from the Indian bureaucracy in Washington to the reservation governments."[11]

Respondents' argument that there is no conflict between the decision of the Seventh Circuit and caselaw ignores the intent of IRA. Indeed, the Federal Respondents discuss the IRA as though

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[10] Fisher v. District Court, 424 U.S. 382, 387 (1976) (". . .the Indian Reorganization Act ... (is).... a statute specifically intended to encourage Indian tribes to revitalize their self-government"); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 151-152 (1972) ("The Indian Reorganization Act . . . reflected a new policy of the Federal Government and . . . tribes were encouraged to revitalize their self-government through the adoption of constitutions and bylaws . . ."); Williams v. Lee, 358 U.S. 217 (1959) ("Not satisfied solely with centralized government of Indians [Congress] encouraged tribal governments and courts to become stronger and more highly organized").

[11] Vine Deloria, Jr. and Clifford M. Lytle, American Indians, American Justice 14-15 (1983 University of Texas Press).

it may be divorced from the principle of a tribe's retained powers of self-government. See Fed. Respondents' Br. 7, Meanwhile, "Plaintiffs agree *Tribes* have the right to determine their own membership, that Indian self-determination includes the right to define the conditions of membership, and that these are core tenets of Indian law." Plaintiffs' Br. 24. Yet, Plaintiffs appear to assert that individual tribal members may exercise such rights, but the duly constituted governing body of the Tribe may not. Clearly, Respondents' arguments that provisions of the IRA somehow short-circuit the TGB's duty to speak in a matter of fundamental importance to the Tribe would gut the intent of the Act.

Respondents' reliance on the Seventh Circuit's observation that the TGB can petition to intervene or participate as an *amicus curiae* also undermines the doctrine of sovereign immunity affirmed by this Court in Kiowa Tribe v. Manufacturing Techs., Inc., 523 U.S. 751 (1998). These alternatives require a Tribe to decide to waive sovereign immunity as a necessary precondition for pursuing tribal interests regarding Secretarial Elections.

C. The Statutory Scheme Governing Secretarial Elections Does Not Purport to Preempt Necessary Party Analysis.

Respondents attempt to deflect attention from a proper necessary party analysis, under Fed. R. Civ. P. 19, by arguing that the Tribe cannot be a necessary party because the Secretary of the Interior has the main responsibility in Secretarial Elections. This argument does not follow. Interestingly, apart from responding to Petitioner's claim that the Seventh Circuit impermissibly interjected an additional criterion into the Rule 19 analysis,[12] the

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[12] In its opening brief to this Court, (Pet. 22-24), the TGB argued that the Seventh Circuit's Decision interjected an additional criterion into the Rule 19 necessary party analysis by implying that, in order to be considered a necessary party, the TGB would need to have first sued the Department of the Interior, seeking a judicial determination as to the Department's continued processing of the matter. Respondents attempt to rebut this claim by characterizing this as an "unremarkable conclusion." Fed. Respondents' Br. 9-10. Plaintiffs suggest that the TGB's failure to institute such an action should not allow it to leverage its position by taking advantage of Rule 19. Pl. Br. 24. However stated, the Seventh Circuit presents an additional element by providing that earlier action by the TBG would have been required, in addition to those stated within Rule 19, for it to be considered a necessary party. Plaintiffs dispute that the Seventh Circuit imposed

Plaintiffs shun a direct discussion of the necessary party analysis. Accordingly, Respondents' arguments primarily concern alleged impotency of the TGB, rather than the necessary party analysis.

Fed. R. Civ. P. 19 requires a two-step analysis to determine whether a party is necessary. The District Court correctly determined that "[u]nder Rule 19(a), the [TGB] is a necessary party . . ." Pet. A-55. Judge Crabb found (emphasis added)

> that the governing board is not a party in this action presents some problems. The proposed amendments dealt with matters of fundamental importance to the tribe. Moreover, should the BIA decision be reversed on the grounds advanced by the plaintiff tribal members, the BIA could be exposed to additional litigation if the governing board were to later bring suit against the BIA to re-instate its decisions for different reasons. See 4 Moore's Federal Practice § 19.03[4](d) (noting how Rule 19 protects "a party against inconsistent court order such that compliance with one might breach another"). Finally, although the dispute in this case involves an administrative decision made by federal officials pursuant to the Indian Reorganization Act, the governing board is not a disinterested bystander. It played a part in this story; indeed, plaintiffs' problems with the 1992 election began when plaintiff Sandra Thomas tried to have the governing board adhere to the membership-related amendment. Hence, even if the BIA decision is reversed and the 1992 results are reinstated, the governing board may frustrate efforts to enforce the amendments. These concerns all support a finding that the governing board is a necessary party. Pet. A-53-54

As recognized by the District Court, a party does not have to be a decisionmaker in order to be a Necessary Party. The Federal Defendants note that the Seventh Circuit based its decision partially upon the observation that Congress rejected a recommendation by

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an additional criterion into the Rule 19 analysis, while asserting that, in 1992, "[m]embers of the TGB could have brought an action to test the approval by the Secretary under the IRA if they believed the Secretary's approval was in error." Pl. Br. 29. Thus, although Plaintiffs purport to say bringing a lawsuit is not an actual criterion, they are alleging it is a proper reason for the TGB not to be considered a necessary party. If so, it is an additional criterion.

the Department of the Interior to give Tribes the authority to decide election challenges in tribal forums. Fed. Respondents' Br. 7. It does not follow, however, from the Department's rejected recommendation that a tribe should be the decisionmaker where election disputes arise, that the Tribe should not be regarded as a Necessary Party because it is not the ultimate decisionmaker.

As noted above, the United States has done a complete about face with respect to the necessary party analysis. See n. 5, supra. In doing so, it abandoned positions that were more sensible and fully documented in favor of essentially stating a position and supporting it only with sparse citation. The U.S. argued to the Seventh Circuit, that the conclusion that the TGB is not only a necessary party but an indispensable party was "unavoidable" and "easily reached", stating within their brief:

> The impact of these amendments on the tribe and its governing board cannot be overstated. There is no question that the disposition of the present lawsuit in the absence of the governing board as a party would severely impair and totally impede the governing board's ability to protect the tribe's interest in its membership and in the length of the terms of its elected officials. . . . In support of their argument, [Plaintiffs] have characterized their claim against the BIA as involving nothing more than the procedural question of whether the BIA violated the 45-day time restriction in 25 U.S.C. § 476(d)(1) by revoking approval of the February 1, 1992 election more than eight months after the election. . . . Plaintiffs' argument is far-fetched and misguided. . . . The conclusion that the Lac Courte Oreilles TGB is a necessary party to the litigation of plaintiffs' claims is unavoidable and was easily reached by the district court. Pet. Reply Br. App. at B10 - 11, B12, and B12 -13.[13]

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[13] With respect to the issue of the Tribe's indispensability, the United States formerly took the position that "[t]here can be no doubt that the district court's determination of indispensability was correct. First a judgment granting the declaratory and injunctive relief sought by plaintiffs would be prejudicial to the governing board's interests. Almost seven years have passed since the election, and Amendments A and B have never been implemented by the tribe. Obviously, a judgment reinstating the election results and amending the tribe's constitution to include Amendments A and B would not only affect directly the term lengths of the board members but would alter the requirements for membership in the Tribe. Courts, including the U.S. Supreme Court, have consistently recognized the

By way of contrast, the United States now argues that the Seventh Circuit's decision does not conflict with decisions of this Court affirming tribal self-government. The United States argues this point from its perception that the Seventh Circuit's decision that the TGB does not have an interest sufficient to be a necessary party was based on "the specific statutory scheme at issue," "and not the court's failure to apply the background principle that a Tribe retains its powers of self-government in the absence of limitation by Congress." Fed. Respondents' Br. 7. Curiously, the United States now relegates tribal powers of self-government it formerly placed in the foreground to the background on the basis of a procedural scheme for conducting Secretarial Elections. In doing so, the United States essentially embraces Plaintiffs' procedural argument that it once deemed "far-fetched and misguided." Pet. Reply Br., App. B-12. Further, such argument only ignores the purpose of the IRA, but the maxim that "[t]he acts of Congress which appear to limit the power of an Indian tribe are not to be unduly extended by doubtful interference." Cohen (ed. 1942), supra, at 122, citing In re Mayfield, Petitioner, 141 U.S. 107, 115, 116 (1891). Sadly, it appears that the United States' drastic revision of its former position is more a product of political considerations by federal agencies than responsive either to the issues in the case or its trust responsibility to the Tribe.

II. THE DECISION OF THE SEVENTH CIRCUIT CONFLICTS WITH SEMINOLE TRIBE V. FLORIDA, 517 U.S. 44 (1996) AND FLORIDA V. SEMINOLE TRIBE, 181 F.3D 1237 (11TH CIR. 1999).

The Respondents have not seriously addressed the conflict the Seventh Circuit decision presents with the decision of this Court in Seminole Tribe v. Florida, 517 U.S. 44 (1996) and that of the Eleventh Circuit, in Florida v. Seminole Tribe, 181 F.3d 1237 (11th Cir. 1999). Rather, the Federal Defendants summarily state that "[n]either case involved any question concerning the statutory scheme at issue here or Rule 19." Fed. Respondent's Br. 9.

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paramount interest of Indian tries in all matters relating to membership, just as they have consistently recognized the sovereign immunity of tribes on such matters." Pet. Reply Br., Appendix at B-15.

Plaintiffs, on the other hand, allege that this Court's decision, in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), stands for the proposition that Congress may abrogate the sovereign immunity of Indian Tribes. Plaintiffs' Br. at 27. Thus, they reason, Seminole, 517 U.S. at 44, is distinguishable because therein this Court determined Congress did not have the power to abrogate the sovereign immunity of states. The reasoning is faulty.

In Santa Clara Pueblo, 436 U.S. at 49, this Court made it clear that tribal courts are the proper forums for the adjudication of individual claims regarding constitutional guarantees provided in the Indian Civil Rights Act (ICRA) of 1968, 25 U.S.C. § § 1301-03, 1321-26, 1341 (1978), except as otherwise provided in ICRA for habeas corpus actions when an individual is incarcerated. However, the issue in the instant matter does not concern the jurisdiction of an asserted cause of action.[14] The issue is whether the Tribe's Governing Body is a necessary party when joined in an action concerning a disputed Secretarial Election related to the Tribe's Constitution. Moreover, in Santa Clara Pueblo, this Court upheld, rather than diminished, the paramount right of Tribes to define and participate in matters of vital tribal concerns. No process was envisioned in Santa Clara Pueblo that would proceed without tribal involvement.

In Florida v. Seminole Tribe of Florida, 181 F.3d 1237 (11th Cir. 1999), the Eleventh Circuit held that a Tribe is subject to suit only where the tribe has waived its immunity or where Congress has authorized the suit. Further, as noted in the TGB's Petition to this Court, the Eleventh Circuit respected the fact that a Tribe's assertion of sovereign immunity may result in a lack of a federal forum to address an issue.

CONCLUSION

For the foregoing reasons and those presented in the Petition of the LCO TGB, a Writ of Certiorari should be granted.

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[14] The TGB has never contended that the action cannot be brought in federal district court; it has contended that the Tribe is a necessary and indispensable party. Further, to say that the venue is federal district court says nothing about the abrogation of sovereign immunity. To assert otherwise is analogous to alleging that the existence of diversity jurisdiction bars defenses that may be raised once suit is brought to court, which, of course, is preposterous. The mere existence of federal jurisdiction reveals nothing about immunities that may be asserted in court.

Dated this 26th day of June, 2000

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Brief of Defendant-Appellees (federal respondents herein) in the United States Court of Appeals for the Seventh Circuit, No. 98-2329, dated August 31, 1998 (with Table of Authorities, Jurisdictional Statement, Statement of Issues and Standards of Review, and Argument Sections I, III and IV deleted).....B-1

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 98-2329

SANDRA THOMAS, et al, Plaintiff-Appellants, v. UNITED STATES OF AMERICA, et al., Defendant-Appellees.	Appeal from the United States District Court for the Western District of Wisconsin Case No. 96-C-828-C Honorable Barbara B. Crabb Presiding

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STATEMENT OF THE CASE

Brief Overview

This is a civil action brought by plaintiffs, who are members or ancillary members of the Lac Courte Oreilles Band of Lake Superior Indians, against the United States government and various present and former federal officials. (R. 2; R. 54, pp. 1-2; and R.56) The suit generally arises from two proposed amendments to the tribe's constitution which were the subject of an election held on February 1, 1992. (R. 2;, R. 54, pp. 1 and 7; and R. 56) Approximately eight months after the election, the Department of the Interior revoked approval of the election, finding that many of the tribal members who voted were not entitled to vote. (R. 54, p. 37; and Appellants' Appendix, A-57) Plaintiffs filed the present lawsuit seeking declaratory and injunctive relief reinstating the election results, compensatory damages and attorneys fees. (R. 2 and R. 54, p. 2)

The district court dismissed plaintiff's claims against defendants Brown and Matheson for lack of personal jurisdiction. (R. 54, pp. 14-16 and 24) The court further determined that the tribal governing board was a necessary party to the litigation of a plaintiffs' claims against the remaining federal defendants. (R. 54, pp. 19-25) Although plaintiffs then sought to join the tribal governing board and each of its individual members to the lawsuit by amending their complaint, the district court ultimately dismissed all of plaintiffs' claims against the governing board based on sovereign immunity and against the individual board members for lack of subject matter jurisdiction. (R. 56; and R. 66) The court further determined that the tribal governing board was an indispensable party to the litigation of plaintiffs' claims against the remaining federal defendants. (R. 66, pp. 12-18) Since the board was immune from suit and could not be joined, the court dismissed plaintiffs' claims against said federal defendants under F.R.Civ.P. 19. (R. 66, pp. 12-18 and 25)

Organization and Membership of the Lac Courte Oreilles Tribe

The Indian Reorganization Act, 25 U.S.C. §§ 461-479; offers tribes the opportunity to become self-governing, and that process starts when a tribe adopts a constitution. (R. 54, p. 3) The Lac Courte Oreilles Tribe adopted a constitution under the Act in 1966. (R. 54, pp. 4-5; and R. 28, ¶ 24)

Several amendments have been made since adoption, but as of 1992 the tribal constitution provided that Lac Courte Oreilles members comprise the following classes of individuals: (1) all persons of tribal blood who were listed on the tribe's 1940 census roll or were eligible to be included on that roll; (2) any lineal descendent of a member born before 1966; and (3) persons who have at least 1/4 tribal blood and have applied for membership under tribal ordinance. (R. 54, p. 5; and R. 28, ¶ 28) As of February 1992, the tribe had 4,378 members, of whom 3,659 were eligible to vote. Also, 1,127 persons were listed on the tribe's ancillary roll, which includes the children of Lac Courte Oreilles members who do not meet any of these membership requirements. (R. 54, p. 5; and R. 28, ¶ 57)

The Proposed Amendments

In the late 1980's, some Lac Courte Oreilles members began to consider amending the tribal constitution to change the structure of tribal government and the standards for tribal membership. (R. 54, p. 6 and R. 28, ¶ 37) In 1988, a committee was formed to explore the issue and plaintiff Sandra Thomas was named as the chairperson. (R. 54, p. 6; and R. 28, p. 43) Roughly three years of meetings and discussion resulted in four petitions for amendments that were circulated among the membership and sent to the local BIA office for approval. (R. 54, pp. 6-7 and R. 28, If 39) Plaintiff Sandra Thomas sponsored the petitions and served as the "Spokesman for the petitioners," pursuant to 25 C.F.R. § 82.1(o). (R. 54, p. 7 and R. 28, ¶ 43)

On November 5, 1991, the local BIA office approved two of the petitions and authorized an election. (R. 54, p. 7 and R. 28, p. 45) Proposed Amendment A eliminated the 1/4 Lac Courte

Oreilles blood membership requirement and enabled any descendant of a Lac Courte Oreilles member to gain membership. Proposed Amendment B extended the length of the terms of the tribal governing board members to four years. (R. 54, p. 7 and R. 28, ¶ 49 and Exhibit N)

The Election

The local BIA office set the election for February 1, 1992. (R. 54, p. 7) This was to be a "Secretarial election," defined in 25 C.F.R. § 81.2 as an election held pursuant to regulations prescribed by the Secretary of the Department of the Interior as authorized by Federal Statute (as distinguished from "tribal" elections which are conducted under tribal authority). (R. 54, p. 13.)

Prior to the date set for the election, registration packets were sent to the 3,659 voting-eligible Lac Courte Oreilles members, advising them of the election and informing them of the need to register. Responses were received from 1,130 Lac Courte Oreilles members who were registered. The election results were as follows: of the total 1,130 registrants, 650 cast votes (474 of which were by absentee ballot). Amendment A passed by a margin of 542 to 105 and amendment B passed by a vote of 373 and 274. (R. 54, p. 7; and R. 28, ¶¶ 59 and 63)

The Post-Election Proceedings

After the election, Gaiashkibos, who was then the chairman of the tribal governing board, questioned the results of the election but on February 10, 1992, the local BIA office approved the amendments and sent written notice to plaintiff Sandra Thomas, as spokesman for the petitioners, and to Gaiashkibos. (R. 54, pp. 7-8 and R. 28, ¶¶ 66 and 72)

Nonetheless, controversy continued over the election, and on April 18, 1992, the tribal governing board passed a resolution to "not recognize" the new amendments. (R. 54, p. 8 and R. 28, ¶¶ 125-128) In addition, on April 16 and 24, 1992, Gaiashkibos sent letters to defendant Brown seeking review of the decision to affirm the election results. Gaiashkibos argued that the election had not been conducted pursuant to certain provisions of the tribal constitution and that not all of the voting eligible members had been informed of the vote because of a clerical error made by the local BIA office. (R. 54, p. 8; and R. 28, ¶¶ 83 and 85)

On October 7, 1992, the defendant Matheson sent a formal reply to Gaiashkibos's April 24 letter. (R. 54, p. 9; R. 28, ¶ 92; and Appellants' Appendix, A-57) Defendant Matheson informed Gaiashkibos that the governing board had no authority to declare the election results void, but that an analysis of tribal records and BIA regulations revealed that the election was indeed flawed and therefore Matheson was revoking the prior approval of the results. Defendant Matheson explained that elections on amendments to tribal constitutions had to be conducted in the same manner as the election on the original constitution, which meant that the voters had to be of the same class. (R. 54, p. 9; and Appellants' Appendix, A-57) Defendant Matheson determined that the original 1966 vote was limited to members living on the Lac Courte Oreilles reservation or to non-reservation residents with at least 1/2 Lac Courte Oreilles blood, and that the 1992 vote was invalid because a large percentage of those members who registered did not meet these qualifications. (R. 54, p. 9; and Appellants' Appendix, A-57) In fact, his analysis of the voting list revealed that of the 650 tribal members who voted, 535 lived off-reservation and voted by absentee ballot but did not appear to have 1/2 degree Lac Courte Oreilles blood quantum. (R. 54, p. 9

and R. 28, ¶ 105) Although Matheson revoked approval of the 1992 results, he explained that the BIA was still compelled to hold an election on the two proposed amendments and directed the local BIA office to make such arrangements. (R. 54, pp. 9-10; and R. 28, ¶ 99) At this new election, however, the only Lac Courte Oreilles members permitted to vote would be those members who lived within the reservation or non-residents who had at least _ Lac Courte Oreilles blood. (R. 54, p. 10; and R. 28, ¶ 107)

For the next three years, the local BIA office and the tribal governing board were in contact about the new election but none was scheduled. (R. 54, p. 10; R. 28, ¶ 134) In July 1995, a representative of Gaiashkibos met with an official from the BIA solicitor's office to determine whether the tribe could pass a resolution enabling an election on different proposed amendments before a re-election on the 1992 proposed amendments. The BIA official drafted a proposed resolution captioned "Dismissal of Secretarial election Held February 1, 1992" and it was passed by the tribal governing board. (R. 54, p. 10; and R. 28, ¶¶ 125-126)

After plaintiffs informed the governing board that they had initiated this lawsuit, the board passed a resolution on May 19, 1997, declaring "to support the Plaintiffs in the lawsuit" but not to join the lawsuit at this time." (R. 54, pp. 10-11) However, the governing board has since revoked that resolution, asserted its sovereign immunity, and has decided not to join the lawsuit. (R. 66, p. 16)

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ARGUMENT DELETED

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II. THE DISTRICT COURT PROPERLY DETERMINED THAT THE TRIBAL GOVERNING BOARD IS NOT ONLY A NECESSARY PARTY BUT AN INDISPENSABLE PARTY

The district court properly determined under Rule 19 that the governing board of the Lac Courte Oreilles tribe is a necessary anal indispensable party to the present lawsuit.

a. The Tribal Governing Board is a Necessary Party

As the district court correctly noted, the determination of whether a party is necessary to a lawsuit involves a two step analysis under Rule 19. Rule 19(a) provides that a party is necessary if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

That the tribal governing board is a necessary party is almost too obvious for words. Plaintiffs want an election from almost seven years ago declared valid, and they want the tribe's constitution amended to include Amendments A and B. Both of the proposed amendments deal with matters of fundamental importance to the tribe.

Amendment A would remove any degree of Indian blood as a requirement for membership. (R. 54, p. 7; and R. 28, ¶ 49) Lineal descendency would become the new standard for membership, regardless of how minute may be the degree of Indian blood. Amendment A would also change the constituency of the elected officials.

Amendment B would double the length of the term of office for each elected member of the governing board. (R. 54, p. 7; and R. 28, ¶ 49)

The impact of these amendments on the tribe and its governing board cannot be overstated. There is no question that the disposition of the present lawsuit in the absence of the governing board as a party would severely impair and totally impede the governing board's ability to protect the tribe's interest

in its membership and in the length of the terms of its elected officials.

As the district correctly observed, should the Bureau of Indian Affairs' decision to revoke its approval of the amendments be reversed by the court in the present lawsuit, the BIA could be exposed to additional litigation. The governing board could later bring its own lawsuit against the BIA to reinstate the BIA's decision for different reasons. (Doc. No. , Opinion and Order, October 14, 1997, p. 21.) Inconsistent court orders could be the result. Rule 19 exists for the very purpose of protecting "a party against inconsistent court orders such that compliance with one might breach another." 4 Moore's Federal Practice § 1903[4][d]. There is no question that in the absence of the tribal governing board as a party, complete relief cannot be accorded among those already parties. See Rule 19(a)(1).

By its actions thus far, it is clear that the governing board is not a disinterested bystander to this litigation. It has played a key role in this controversy from the very beginning when plaintiff Sandra Thomas tried to have the governing board adhere to the membership requirements of Amendment A. If the court were to reverse the BIA's decision to revoke its approval of the amendments and grant the relief plaintiffs have requested, such that the 1992 election results approving the amendments are reinstated, the governing board as a nonparty to this action could frustrate efforts to enforce the amendments. All of these concerns support the district court's determination that the governing board. is a necessary party.

A party is "necessary" under Rule 19 (a) if either of the two conditions set forth in that rule is satisfied. Both are satisfied here. To reiterate, complete relief cannot be accorded among those already parties in the absence of the governing board as a party. Rule 19(a)(1). Secondly, the absence of the governing board as a party will impair and impede the board's ability to protect its own interest and the interest of the tribe it represents, and it would leave the defendants who are already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest. Rule 19(a)(2).

Plaintiffs' contention that the tribal governing board is not a necessary party for resolving plaintiffs' claims against the BIA simply lacks merit. In support of their argument, they have characterized their claim against the BIA as involving nothing more than the procedural question of whether the BIA violated the 45-day time restriction in 25 U.S.C. § 476(d)(1) by revoking approval of the February 1, 1992 election more than eight months after the election. (Plaintiffs' brief, pp. 16 and 20.) By characterizing their claim as procedural in nature, plaintiffs then argue that the governing board has no independent interest in this procedural requirement (the 45-day time restriction) and, therefore, it is not a necessary party. Plaintiffs' argument is far-fetched and misguided.

Plaintiffs' claims against the federal defendants do not boil down to a-simple procedural question of whether the BIA violated the 45-day time limit. Plaintiffs' claims go much deeper and are substantive in nature, as a reading of the complaint and amended complaint plainly demonstrate. What plaintiffs are really seeking is substantive relief: reinstatement of the 1992 election results and enforcement of Amendments A and B. Such relief, if granted, would have a grave and profound impact on the Lac Courte Oreilles tribe, particularly since one of the amendments would drastically alter the requirements for tribal membership. Membership has consistently been recognized by the courts as a matter of paramount importance to Indian tribes. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

As a second prong to plaintiffs' contention that the tribal governing board is not a necessary party, plaintiffs assert that the February 2, 1992 Secretarial election was a federal election and, therefore, the present dispute should be resolved in federal court, notwithstanding the absence of the governing board as a party. (Plaintiffs' brief, pages 21-23.)

Once again, plaintiffs' are missing the point. A Secretarial election is indeed a federal election but this fact alone does not automatically entitle plaintiffs to litigate their lawsuit in federal court. Plaintiffs cannot escape Rule 19 which, when applied to the facts in this case, leads inevitably to the finding that the tribal governing board is a necessary party to the present litigation. The conclusion that the Lac Courte Oreilles tribal governing board is a

necessary party to the litigation of plaintiffs' claims is unavoidable and was easily reached by the district court.

b. The Tribal Governing Board is an Indispensable Party

Upon determining that the governing board is a necessary party, the district court temporarily stayed the lawsuit to give the governing board an opportunity to waive its sovereign immunity and voluntarily join as a party. (R. 54, pp. 24-25) The court also allowed time for the plaintiffs to amend their complaint to include the governing board as a defendant, in the event the governing board did not voluntarily intervene. (R. 54, pp. 23-24.) Since the governing board did not intervene, plaintiffs amended their complaint to add not only the tribal governing board as a defendant but also each of its seven individual members, referring to them collectively as the "joined defendants." For purposes of discussion, defendants will refer to the tribal governing board and its individual members as the "joined defendants" or collectively as the governing board.

The joined defendants asserted sovereign immunity and moved the district court to dismiss them as parties for lack of subject matter jurisdiction. Since the court determined that the joined defendants were immune from suit and that plaintiffs' claims against them should be dismissed because subject matter jurisdiction was lacking, the court then had to determine whether the joined defendants were "indispensable" under Rule 19(b). If an absent party is "necessary" but cannot be joined, and if the court determines that the absent party is "indispensable," the entire cause of action must be dismissed. United States ex rel. Hall v. Tribal Development Corp., 100 F.3d 476, 478-479 (7th Cir. 1996).

Rule 19(b) is the guidepost for this analysis. That rule provides that if a party is necessary but cannot be joined,

> [T]he court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.

Rule 19(b) lists four factors to guide the court's analysis:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Recent case law -- especially that dealing with Indian tribes -- makes clear that application of these factors is to be truncated when the necessary party cannot be joined due to immunity. "It has been held that when an indispensable party is immune from suit, there is very little room for balancing of other factors set forth in Rule 19(b), because immunity may be viewed as one of these interests compelling by themselves." Fluent v. Salamanca Indian Lease Authority, 928 F.2d 542, 548 (2nd Cir.), cert. denied, 502 U.S. 818 (1991). See also, Wichita and Affiliated Tribes of Oklahoma v. Hodal, 788 F.2d 765, 777 and n.13 (D.C. Cir. 1986). As the Second Circuit has explained:

> The rationale behind the emphasis placed on immunity in the weighing of Rule 19(b) factors in that the case is not one where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.

Fluent v. Salamanca, supra, 928 F.2d at 548 (emphasis added). Thus, the interest in preserving tribal immunity, standing alone, compels a finding of indispensability and the dismissal of this lawsuit. 4 Moore's Federal Practice 19.05[2][c] n.39 (3d ed. 1997). Given the compelling interest in preserving tribal immunity, Rule 19(b)'s four part test need not be applied.

The district court in its discretion still chose to consider the four factors in Rule 19(b). In so doing, the court stated that "A brief review of these four factors establishes conclusively that plaintiff's claims cannot be adjudicated 'in equity and good conscience,' given the absence of the governing board. (R. 66, p. 16)

There can be no doubt that the district court's determination of indispensability was correct. First, a judgment granting the declaratory and injunctive relief sought by plaintiffs would be prejudicial to the governing board's interests. Almost seven years have passed since the election, and Amendments A and B have never been implemented by the tribe. Obviously, a judgment reinstating the election results and amending the tribe's constitution to include Amendments A and B would not only affect directly the term lengths of the board members but would alter the requirements for membership in the tribe. Courts, including the U.S. Supreme Court, have consistently recognized the paramount interest of Indian tribes in all matters relating to membership, just as they have consistently recognized the sovereign immunity of tribes on such matters. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

To date, the amendments have not been implemented. (R. 28, ¶ 84, Exhibit N) If the amendments are now declared approved and such approval is deemed effective retroactively to a date 45 days after the February 1, 1992 election, as plaintiffs have requested, this result could call into question the validity of the make-up of the board during the intervening years. It could be argued, for example, that during those years the board was not properly elected because potentially eligible members were not given an opportunity to vote. It could also be argued that the Board members elected at any time after the February 1, 1992 election were elected for incorrect terms of office, since they were elected for only two-year terms instead of four-year terms.

Calling into question the make-up of the board necessarily calls into question the very validity of all of the board's decisions and actions during those years. Such a result would create chaos and would be a disaster for the tribe. Clearly, the granting of the specific declaratory and injunctive relief sought by the plaintiffs would be extremely prejudicial to the tribal governing board, as well as the tribe it represents.

Second, the district court correctly determined that prejudice to the governing board cannot be avoided through a careful shaping of relief. The relief that plaintiffs are seeking is reinstatement of the 1992 election results, i.e., enforcement of Amendments A and B. The amendments are not subject to modification, and there is simply no way to lessen or avoid the prejudice that would result to the governing board and to the entire tribe it represents if the amendments are enforced.

Third, a judgment rendered in absence of the governing board as a party would not be adequate, since it would not take into consideration the governing board's position on the merits. The district court appropriately observed that "Any measurement of its view of the merits would be speculative." (R. 66, p. 16)

Concerning the fourth and final factor, the district court correctly determined that it, too, points in favor of dismissal of this lawsuit. The fourth factor concerns whether the plaintiffs will have an adequate remedy if the lawsuit is dismissed for nonjoinder. Granted, it may be that plaintiffs will have no other remedy should their claims in this lawsuit be dismissed. Nevertheless, to allow the lawsuit to proceed for this reason alone would render meaningless the firmly recognized principle of tribal sovereign immunity. As the district court held, "Permitting this suit to move forward even though tribal immunity remains intact would send the false signal that the federal courts, not tribal polling booths, are an appropriate place for different tribal political factions to settle their disputes." (R. 66, p. 17)

Defendants are not arguing that the governing board would be an indispensable party to the litigation of any and all claims plaintiffs conceivably could have brought, arising from the 1992 election. Defendants are only contending that the board is indispensable with respect to the particular claims for relief plaintiffs chose to bring in this case. It is important to note that in

the present lawsuit plaintiffs are not seeking declaratory relief as to the correct class of voters who should be eligible to vote if a new election on Amendments A and B were to be held. Nor are they seeking mandamus relief to compel the Secretary to hold a new election for the correct class of voters. Plaintiffs do not want a new election. They want the 1992 election results declared approved and Amendments A and B implemented. Such a suit should not be permitted to proceed, in light of the tribe's sovereign immunity, even if dismissing the suit will leave plaintiffs with no other mechanism for resolving their present claims.

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ARGUMENT DELETED

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\CONCLUSION

For the foregoing reasons, the government respectfully requests that the judgment of the district court be affirmed.

Dated this 31st day of August, 1998.

Respectfully submitted,

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By:

/s/
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